BRITISH COLUMBIA'S NEW LICENSED ENVIRONMENTAL PROFESSIONAL FRAMEWORK

DECEMBER 15, 2004

PREPARED FOR:

ROSTER STEERING COMMITTEE
LEP SUBCOMMITTEE

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BRITISH COLUMBIA'S NEW LICENSED ENVIRONMENTAL PROFESSIONAL FRAMEWORK: EXECUTIVE SUMMARY

1. INTRODUCTION

This report proposes a Framework for a new Licensed Environmental Professional ("LEP") system for British Columbia's contaminated sites regulatory scheme. For the purpose of developing the Framework, the report assumes that the new LEP system will replace the existing Roster of Professional Experts ("RPE") system on April 1, 2006. The Framework identifies the pragmatic conditions necessary for a workable LEP system. It also provides detailed guidance for the next stage of work, namely, development of necessary support documents for a new LEP Board ("Stage 3").

2. BACKGROUND

The Framework is the latest step in the evolution of a LEP system. In May 2003, the Minister's Advisory Panel on Contaminated Sites recommended a new LEP system. Since then, the Roster Steering Committee (the "RSC", which administers the RPE system) and the Ministry of Water, Land and Air Protection (the "Ministry") have entered into an arrangement which has produced progressively focused analysis of a possible LEP system. In recent months, the RSC appointed a LEP Subcommittee to propose a LEP Framework. In developing this Framework, the Subcommittee reviewed past work on the LEP concept, administered a questionnaire on LEP options, held a roundtable consultation, and met on various occasions.

The key assumptions and considerations governing the Framework are as follows:

- *The LEP system will use a "hybrid" model that seeks to operate more independently from the Ministry than the current RPE system, and at the same time coordinate its work with three 'parent' organizations, namely the Association of Professional Engineers and Geoscientists of British Columbia ("APEGBC"), the British Columbia Institute of Agrologists ("BCIA"), and the College of Applied Biology ("CAB").*

- *This "hybrid" does not go so far, however, as to create a full self-regulating profession with its own legislation. The Subcommittee found that the option of a self-regulating profession with stand-alone enabling legislation has certain advantages (especially respecting liability protection) but is unattainable at this time, given the immediate requirement to establish the LEP system by April 1, 2006. A substantially longer period of time would be required for consultation, buy-in from relevant professions and stakeholders, and drafting and approval of stand-alone legislation.*

- *LEP reviews and recommendations will be essential and mandatory to Ministry regulatory approvals respecting low risk and moderate risk sites; owners of these sites will be required to retain LEPs to prepare the necessary reviews and*

recommendations to the Ministry. It follows that Ministry staff will not be involved in reviewing such applications.

- *The Ministry's regulatory focus will be on high risk sites.*
- *LEP reviews will be able to use an enhanced degree of professional judgment.*
- *An LEP Board will take on primary responsibility for taking on the "audit" function now discharged primarily by the Ministry (with involvement by the RSC). This new audit function will be called "performance assessments". The Ministry may conduct audits of the LEP Board performance assessments (in an 'audit of the audit' function).*
- *LEPs will not provide review services if they face undue liability exposure. Nor will LEPs (or other prospective board directors) be willing to sit on a LEP board if they face personal liability for debts or wrongdoing of the LEP organization. LEP review and governance functions must be carefully designed to limit liability exposure to a reasonable degree.*

3. SOCIETY AS THE LEGAL FOUNDATION

In order to establish the necessary legal foundation for the hybrid LEP system, the Subcommittee recommends establishing a "society" under the British Columbia Society Act, R.S.B.C. 1996, c. 433. Although it is an imperfect model, a society can implement the principal elements of the proposed Framework particularly by creating a supervisory board, setting qualifications for membership, administering procedures for scrutinizing LEP performance and conduct (discipline, public complaints and performance assessment), and adopting practice guidelines.

4. BOARD MEMBERSHIP

In line with the experience in other jurisdictions, industry groups, municipalities and environmental groups in British Columbia may have an interest in participating in the LEP Board. To ensure that these interests are in fact reflected, while at the same time ensuring that the Board size is maintained at a workable level, the Subcommittee proposes the following Board representation for a 12-seat Board:

- *APEGBC – one member who is also a LEP;*
- *BCIA – one member who is also a LEP;*
- *CAB – one member who is also a LEP;*

- *one other LEP who is not eligible for membership in one of the three parent organizations;*
- *industry – one member;*
- *local governments – one member;*
- *environmental group – one member; and*
- *Ministry – one member (ex officio).*

5. BOARD FUNCTIONS

The Subcommittee proposes that the LEP Board will perform many of the functions now exercised by the RSC when administering the RPE system, notably administering member admission, verifying qualifications, and general administrative upkeep of the system.

The LEP Board (and its subcommittees) will, however, be considerably more active than the RSC, largely reflecting its more independent status. New demands will arise to:

- *develop procedures and manage three essentially new areas of responsibility, namely:*
  - *discipline;*
  - *performance assessments (analogous to current RPE audits), and*
  - *public complaints;*
- *develop and implement practice guidelines;*
- *provide members and prospective members with professional education of the new procedures and practice guidelines;*
- *consider the need for and perhaps enforce an omnibus insurance requirement for LEPs (using more detailed liability analysis and consultations with the insurance industry as a basis);*
- *liaise with the Ministry on new roles for LEP, including:*
  - *LEP role in entering information on site registry;*
  - *LEP duties and responsibilities respecting "Summaries of Site Condition"; and*
  - *LEP reviews of screening decisions (including categorization of sites);*

- *liase and work cooperative with the Science Advisory Board for Contaminated Sites in British Columbia on various scientific, technical and educational aspects relating to standards and procedures for investigating and remediating sites;*

- *develop and administer special qualifications for professionals who are not eligible for qualification in one of the three parent organizations (APEGBC, BCIA, and CAB); and*

- *respond to Ministry audits of Board performance assessments (i.e., the Ministry's contemplated 'audit of the audit').*

6. *LEP MEMBERSHIP*

Member admissions criteria of the proposed Framework will largely mirror the existing RPE criteria, except that CAB members will be able to seek qualification (reflecting recent changes in the RPE system), special admission arrangements will be made for professionals who are not eligible for membership in one of the three parent organizations, and the $2 million insurance requirement will be dropped (in favour of an insurance disclosure requirement).

In summary, the Framework admissions criteria are as follows:

- *APEGBC, BCIA, or CAB membership;*

- *a minimum number of years' experience in contaminated site work (to be determined in Stage 3);*

- *passing grade (as established by the Board) on a written examination comprising three separate components: regulatory context; technical application of numeric standards; and technical application of risk assessment;*

- *appointment as confirmed by Board (on a review of qualifications and examination); and*

- *for other qualified specialists who are not eligible for membership in APEGBC, BCIA, or CAB, satisfaction of unique requirements established by the LEP Board. The Subcommittee recognizes that the investigation and remediation of many contaminated sites may require the application of unique expertise (eg. toxicology, chemistry) falling outside of the established professions such as engineering, geoscience, biology and agrology (including their respective "limited licensees"). The development of a LEP system must ensure that there is an adequate availability of such expertise.*

7. TYPES OF LEP PROFESSIONALS

The investigation and remediation of many sites require the coordinated application of different types of professional expertise. The Subcommittee concludes that the coordinated application of specialized expertise can be achieved with a 'lead LEP approach'. The proposed LEP system recognizes that, particularly at complex sites, a single LEP might not be qualified to review all aspects of the subject investigation and remediation, and he or she must turn to other experts for advice. For example, at a complex site involving the application of both the numeric and risk-based remediation standards, an LEP might be qualified to comment on the former but not the latter. In this instance, the LEP could still serve as the 'lead LEP', but he or she would be required to seek and obtain the necessary supplementary expertise. Practice guidelines (to be developed in Stage 3) would direct the LEP's efforts in coordinating the necessary expertise.

The lead LEP model avoids the administrative problem of the owner retaining two or more LEPs. The preferred approach, as suggested above, is to place the onus on the lead LEP to coordinate the necessary expertise. The lead LEP is in the best position to determine, as governed by practice guidelines, if and how to acquire the necessary additional expertise.

The lead LEP model is consistent with the Ministry intention to recognize two distinct types of LEPs (each corresponding to the numeric and risk-based standards of the Contaminated Sites Regulation). Specifically, the Ministry's intention is taken into account by the proposed system in two ways:

- *a LEP will only be qualified to provide a review respecting a particular type of standard if he or she passes the applicable admission examination (the proposed new examination system would allow the LEP applicant to write one or both of the numeric and risk-based standards examinations); and*

- *as noted above, the lead LEP who is qualified to review issues under one type of standard must seek qualified LEPs to review issues respecting the other type of standard.*

8. FORMS OF LEP REVIEWS

The Subcommittee recognizes that two basic forms of review, "Self-review" and "Review of Others' Work", are now used in the RPE system. The Subcommittee also recognizes that each form of review has unique advantages that should be implemented in the LEP system. The self-review model is most likely to realize time and cost savings because the owner is required to hire only one party – i.e., the same consultant does the work and then compiles the review. The obvious risk or danger inherent in this model is that there is, at a minimum, no guarantee of adequate independence; that is, there would at least be

an apprehension of conflict of interest by the LEPs who are conducting the self-review, and this may lead to a derogation of public confidence in the LEP system.

Review of others' work is, at least theoretically, a more independent exercise. This type of review, however, would in practice require that the property owner retain two sets of consultants – the consultant doing the work and the reviewing LEP – which could result in delay and higher costs.

The Subcommittee proposes a system which will allow some degree of self-review without compromising the paramount goal of independence. Practice guidelines to be developed in Stage 3 will provide guidance for which type of review (self-review and review of others' work) can be applied to particular types of applications. The paramount principle underlying these practice guidelines should be that a higher degree of complexity and risk will require a higher degree of reviewer independence.

9. PRACTICE GUIDELINES

The Framework identifies current issue-specific gaps in practice guidelines, and how they can be corrected. This analysis proposes, for example, new practice guidelines for governing choice of form of reviews (i.e., whether self-review can be used), conflict of interest and the role of lead LEPs, insurance disclosure, ethics, general standard of care, relationship with owner and successor LEPs. The reliance on "practice guidelines" will fill a current gap: the current RPE system is often criticized for giving inadequate guidance on <u>how</u> reviews should be conducted (aside from the matter of <u>what</u> must be considered).

10. PERFORMANCE ASSESSMENTS

The LEP Board will take on primary responsibility for the "audit" function now discharged primarily by the Ministry (with involvement by the RSC). This new audit function will be called "performance assessments".

Performance assessment guidelines (to be developed in Stage 3) should cover the following subjects:

- *appointment of performance assessors;*
- *the role of a performance assessment coordinator;*
- *triggers for and frequency of performance assessments;*
- *conflict of interest respecting LEP/assessor relations;*
- *opportunities for exchange of professional views;*

- *contents of a performance assessment reports;*
- *time limits at various stages of the process;*
- *publication of performance assessment;*
- *rules on if and how notice should be given to the parent organization and a referral to the LEP disciplinary procedure in the event of an unsatisfactory performance assessment;*
- *communication of performance assessment to the Ministry and the owner;*
- *status of each requested instrument (eg., High Risk Classification, Summary of Site Condition, Approval in Principle, Certificate of Compliance) during conduct of a performance assessment;*
- *appeal rights for LEPs; and*
- *storage and management of performance assessment documents.*

11. PUBLIC COMPLAINTS

LEP systems in other jurisdictions typically allow for a public complaint (including an investigation process). Providing an effective opportunity for filing legitimate public complaints about LEP reviews or conduct is, in the opinion of the Subcommittee, a necessary step for ensuring public confidence in the LEP system. The Subcommittee recognizes that LEP reviews may be matters of public interest, especially given the environmental and property risks associated with contaminated sites.

12. DISCIPLINE

Disciplinary matters will be a key function of the new LEP Board. Stage 3 will prepare bylaws and related documents respecting the substantive standards to be applied in disciplinary proceedings.

The LEP disciplinary proceeding is independent of but related to two other key LEP processes: the public complaints process and performance assessments. The public complaints process will focus on particular allegations by members of the public, and thus have limited scope. That is, the investigation should be directed at the specific conduct complained about, not at the member's overall practice or handling of a particular project. In contrast, a performance assessment will typically be broader in scope and include the member's practice methodology used to provide the review (and will be triggered by, say, a 1/10 selection ratio as is the case for RPE audits today). As for a disciplinary proceeding, the Board should retain broad discretion for determining

whether a disciplinary matter is warranted, but an egregious problem identified in a performance assessment or a public complaints process may warrant referral to the disciplinary process. These linkages (including the test for determining when referrals can occur), should be clearly specified in LEP Board performance assessment and public complaints rules.

13. LIABILITY

Exposure to liability may be the single most important factor to determining whether in fact LEPs will be willing to supply the services necessary to meet the demand from property owners for pre-approval reviews. Similarly, liability exposure issues arise for directors and officers of a LEP Board and for LEPs who provide other services contemplated by the Ministry (notably preparation of summaries of site conditions and regulatory sign-offs). Accordingly, the Subcommittee identified liability issues and noted how they might constrain the willingness and ability of LEPs to provide various types of services.

The Subcommittee concluded that the degree of LEP liability exposure is impossible to determine with any precision, especially before the system is implemented. The Subcommittee therefore proposes the following approach for contending with possible liability issues. Before the assumed start-up on April 1, 2006 (during Stage 3), the Subcommittee proposes that the RSC take the following steps:

- *the RSC should obtain a detailed legal opinion covering liability issues; and*
- *on the basis of the opinion, the RSC should enter discussions with the Ministry to identify and implement measures to reduce uncertainty and risk (eg. specifying standard wording in reviews to clarify that the reviews are not to be relied upon by parties other than the LEP's client and the Ministry).*

For the period after start-up, the Subcommittee proposes that the new LEP Board should:

- *analyze the extent to which the liability issues arise in real-life LEP reviews;*
- *consider if and how an omnibus insurance requirement could be imposed (including discussions with insurers); and*
- *enter discussions with the Ministry to determine if, short of broad statutory immunity, certain discrete forms of immunity can be provided to LEPs, especially if insurance coverage is not possible. For example, the Province could indemnify an LEP in the event that he or she must attend as a witness in an Environmental Appeal Board or other matters on behalf of the Ministry.*

14. FINANCIAL MATTERS

The Subcommittee preliminarily proposes, on the basis of very significant data limitations, that the budget for an LEP Board would be about $655,000. Further work is necessary before April 1, 2006, including:

- *statistical analysis of the likely level of LEP service requirements and the corresponding LEP membership);*
- *preparation of a draft budget for the LEP Board (first year and three-year period);*
- *preparation of a draft fee schedule for LEPs, for cost recovery purposes; and*
- *preparation of Ministry/LEP cost-sharing options (one-year and three-year basis) to be considered by the RSC in pre-April 1, 2006 negotiations over LEP budget financing (recognizing that funding must be secured for the purposes of the LEP Board prior to start-up).*

15. STAGE 3 WORK

Development of Tools for LEP Board

The Subcommittee recommends that Stage 3 should be devoted to the preparation of tools to enable the LEP Board to discharge its various functions immediately upon start-up. On a priority basis, Stage 3 work should:

- *establish a Society and Board;*
- *effect a roll-over of RPE "roster experts" to LEPs;*
- *develop performance assessment guidelines, including conducting a trial period of performance assessments prior to start-up;*
- *conduct an analysis of liability exposure, including consultations with the insurance industry and the Ministry to determine alternative means of reducing liability exposure;*
- *develop practice guidelines, particularly guidance for Lead LEPs, self-review, review of others' work, insurance disclosure, ethics, general standard of care, relationship with owner and successor LEPs; and*
- *prepare a financial model and cost-sharing agreement with the Ministry;*

On a less urgent basis, but nonetheless essential prior to LEP system start-up, the Subcommittee recommends that Stage 3 work:

- *prepare professional conduct and disciplinary rules;*
- *develop relations of LEP Board with parent organizations (eg., discipline);*
- *establish admissions requirements for LEP membership; and*
- *prepare a public complaints process.*

1.0 INTRODUCTION

1.1 Purpose of the Framework Report

This report proposes a Framework for a new Licensed Environmental Professional ("LEP") system for management of non-high risk contaminated sites in British Columbia. The purpose of the Framework is to set out the guiding principles and a plan for implementing a new LEP system.

The proposed LEP system relies heavily on the professional review system that is now a feature of the contaminated sites management scheme. Reflecting the existing Roster of Professional Experts ("RPE") system, the proposed LEP system requires property owners to obtain reviews (including necessary documentation and recommendations) from LEPs to support their applications for regulatory approval by the Ministry of Water, Land and Air Protection (the "Ministry").

The proposed LEP system, however, is not merely an expansion of the RPE system; it departs significantly from the current approach. Of the many proposed changes, two are especially noteworthy:

- LEPs will, under the proposed system, organize themselves as a society with membership, performance assessment, discipline and other quality control and governance features typically found in professional organizations. The society will be more independent than the current relatively informal arrangement created by the Ministry to manage the RPE system through the Roster Steering Committee ("RSC").

- Practice guidelines will clarify how reviews should be done. Practice guidelines will address many issues, including coordination of LEP reviews, conflict of interest, LEP-client relations, and the extent to which LEPs may review their own work. Practice guidelines will fill a current gap; the current RPE system is often criticized for giving inadequate guidance on <u>how</u> reviews should be conducted (aside from the matter of <u>what</u> must be considered).

The Framework identifies the many pragmatic conditions necessary for a successful LEP system. These conditions reflect the interests of the following key parties: prospective LEPs, as represented by the RSC; the Ministry, whose regulators will rely on LEP reviews; property owners, who will retain LEPs to obtain regulatory approvals; and local governments, whose development approval decisions may be informed by LEP reviews. Overall, however, the Framework recognizes that the accommodation of these interests must recognize the paramount goals of environmental and human health protection.

The Framework also provides detailed guidance for the next stage of work ("Stage 3"), namely development of necessary support documents for a new LEP Board whose targeted installation date is April 1, 2006.

1.2 The Fundamental Assumptions of the Framework

The Framework is governed by several fundamental assumptions that have been identified and refined in a staged process (described in Part 2 below) during the past two years. These governing assumptions are as follows:

- A LEP system will replace the current RPE system.

- A new LEP organization will be a "hybrid" in that it will operate more independently from the Ministry than the current RPE system, with its own supervisory Board, but will cooperate closely with the Ministry and with the three 'parent' organizations, namely the Association of Professional Engineers of British Columbia ("APEGBC"), the British Columbia Institute of Agrologists ("BCIA"), and the College of Applied Biology ("CAB"). This approach does not go so far as to establish a full self-regulating profession with its own stand-alone legislation (such as APEGBC), largely due to practical timing constraints, in the immediate future; use of the hybrid model does not preclude evolution over the longer term to a full self-regulating model.

- To become LEPs, professionals must qualify for and become members of the new LEP organization.

- Professional reviews of non-high-risk contaminated sites can only be conducted by LEPs.

- Unlike the traditional approach, site owners will no longer have a choice between seeking a review from Ministry staff or a Roster Expert (either by Expert submission or by external contract review). LEP reviews will be preconditions to Ministry regulatory approvals respecting sites not classified as high risk. In fact, this assumption has recently (July 9, 2004) been implemented by the Ministry:

    - effective July 15, 2004, the Ministry requires all "eligible" applications to be submitted either as roster submissions by RPE "approved professionals" or for external contract review; and

    - effective November 1, 2004, all applications for "low to moderate risk" sites must be submitted as roster submissions by approved professionals.[1]

- The Ministry's regulatory focus will be on high risk sites.

- LEP reviews, when compared with the current RPE system, will be able to use an enhanced degree of professional judgment.

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[1] "Eligible applications" are those that qualify under Protocol 6 for the roster process and those that are eligible for external contract review including site investigations, remediation plans and confirmation of remediation report.
See: "Update on Contaminated Sites – Next Steps to Reduce the Service Backlog", in
http://wlapwww.gov.bc.ca/epd/epdpa/contam_sites/updates/index.html

- The LEP organization will take on primary responsibility for taking on the "audit" function now discharged primarily by the Ministry (with involvement by the RSC). This new audit function will be called "performance assessments". The Ministry may conduct its own audits of LEP Board performance assessments (an 'audit of the audit' function).

- LEPs will not provide review services if they face undue liability exposure. That is, any LEP review function must be carefully designed to limit liability exposure to a reasonable degree (eg. by providing adequately clear guidance, insurance or other forms of liability protection).

- The targeted start-up date for a new LEP system, for the purposes of this development work, is April 1, 2006.

1.3 Organization of the Report

Part 2 provides background on the development of the LEP system.

Each of the following parts is devoted to an essential component of the LEP Framework, specifically:

- 3.0 Use of a Society as the Legal Foundation
- 4.0 LEP Board Membership
- 5.0 LEP Board Functions
- 6.0 LEP Membership
- 7.0 Types of Professionals
- 8.0 Forms of LEP Reviews
- 9.0 'Audits'
- 10.0 Public Complaints
- 11.0 Liability of LEPs
- 12.0 Other Practice Guidelines
- 13.0 Financial Matters
- 14.0 Conclusions

The Conclusions provide detailed guidance for the development of various tools for the critical months of preparation leading to the assumed LEP system start-up of April 1, 2006. A high priority in the coming months is the preparation and, ideally, trial period implementation of an LEP "performance assessment" (i.e. audit) process before April 1, 2006. This will require preparation of "practice guidelines" that will provide objectively verifiable criteria in performance assessments. Another high priority is to make the necessary pre-April, 2006 arrangements to ensure from the outset an effective working Board and an adequately broad base of LEP members with the necessary capacity to provide a wide range of reviews. Further analysis of LEP liability exposure and related discussions between the RSC and the Ministry are also a high priority – prospective LEPs must be satisfied, as a result of this analysis and discussion, that they will not face undue liability exposure.

2.0 BACKGROUND

2.1 The LEP Subcommittee

To advance the development of the LEP system, the RSC in late 2003 established a four-person LEP Development Subcommittee (the "Subcommittee"). The Subcommittee was given broad responsibility for providing LEP-relevant advice to the RSC, including overseeing the work and deliverables of contractors and project staff.

Membership for the Subcommittee is specified as follows:

> The Task Force [i.e., the Subcommittee] will consist of four or more members with the following individual or combined qualifications: at least one must be a member of the Roster of Professional Experts, one a non-rostered contaminated sites practitioner from a discipline that does not currently qualify for appointment to the Roster but is likely to qualify for LEP licensure, one a representative of the Ministry of Water, Land and Air Protection, and one a member of the Roster Steering Committee. [see: http://www.apeg.bc.ca/aboutus/cs/LicensedEnvironmentalProfessional.html]

Members currently appointed to the Subcommittee are:

Alan Walker, P.Eng. (RSC Member);

Lee Nikl, R.P.Bio. (Risk Assessor);

Scott Hannam (Analytical Chemistry); and

Glyn Fox, Ph.D. (Ministry; RSC).

The Subcommittee has undertaken three key initiatives since its inception. First, it administered a questionnaire on LEP options in late 2003 and early 2004. Then, based on the questionnaire responses and other analysis, it prepared a "Recommendations Report" that identified the main directions of a new LEP system.[2] (The Recommendations Report is discussed in more detail in Part 2.3 below.) The third key initiative, especially in recent months, has consisted of preparing this Framework report.

To assist its work, the Subcommittee established an LEP Stakeholder Advisory Group. This Group was established to encourage the active participation of major industrial, institutional and other stakeholder groups in the development of the new system. Members of the Group represent major institutional, industrial, municipal and other stakeholder groups and are responsible for disseminating information to these groups and providing advice to the Subcommittee and RSC on behalf of the groups they represent.

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[2] Recommendations for a "Licensed" Environmental Professional System for Contaminated Sites in British Columbia. Roster Steering Committee of British Columbia, August , 2004.

2.2 Progress to Date

The Framework is the latest step in the evolution of a new LEP system. Important milestones in the development of the proposed LEP system include the following:

- **July 1999:** The Ministry initiated an RPE system, which sought to allow fuller use of professional advice – particularly advice from experts in the private sector – in the course of making regulatory decisions.

- **May 2003:** An Advisory Panel appointed by the Minister of Water, Land and Air Protection published a report with recommendations addressing concerns raised during a comprehensive public consultation process. The Advisory Panel called for even heavier reliance on private sector professional advice than found in the RPE system and recommended the establishment of a independent body of professional advisors[3]. The Advisory Panel concluded that an LEP system should primarily address low to moderate risk sites, allowing the Ministry to focus on high-risk sites.

- **June 2003:** The RSC accepted a conditional grant from the Ministry to assist in developing a new LEP system[4]. The RSC's development work must be completed by March 31, 2006. The grant contemplates three stages of work, as discussed below.

- **Stage 1 (June 2003 to October 2003)**: This stage identified key concepts which warrant further scrutiny in developing a new LEP system. This work included:

    - review of the existing RPE system as well as LEP systems in other jurisdictions (Connecticut, Massachusetts, California, Washington, Australia and Ontario) to identify basic issues that require resolution in the development of an LEP system in British Columbia;

    - preparation of a report, *Considerations for Establishment of a Licensed Environmental Professional System for Contaminated Sites in British Columbia* (the "Considerations Report"). This report identified eight key concepts that required further analysis and clarification before a pragmatic framework could be established;

    - conducting a workshop session in Vancouver with two senior officials involved in the Massachusetts Licensed Site Professional system. The Massachusetts system was viewed as a precedent in the Advisory Panel report and the workshop allowed closer scrutiny of the merits of that system; and

[3] See: http://wlapwww.gov.bc.ca/epd/epdpa/contam_sites/ministers_panel/ministerspanel.html
[4] See the RSC website: http://www.apeg.bc.ca/aboutus/cs/contamsites.html)

- the RSC's establishment of the Subcommittee and the LEP Stakeholder Advisory Group.

- **Stage 2 (October 2003 to November 2004):** This stage has included:

  - public consultation on preferred LEP system and development of recommendations for the new LEP system;

  - conducting a survey of practitioners, regulators, governments, industries, and the public as to responsibilities and functions of a new LEP system. The survey, in summary, sought responses on options set out in the Considerations Report[5];

  - preparation of a "Recommendations Report" that has been the subject of recent public review[6]; and

  - preparation of this Framework Report, which has taken into account the above items and included a roundtable meeting of key stakeholders and public review of a draft version of the Report.

- **Stage 3 (September 2004 to March 2006):** Development of an administrative support system and related tools will occur in this stage. These tools will be developed once the Subcommittee reviews response to the Framework Report and the RSC receives approval from the Ministry to proceed.

2.3 The Subcommittee Recommendations Report

The Subcommittee Recommendations Report recognized that the current RPE system enables the provincial government to achieve quality assurance with its broad scope and ultimate authority to establish admission or registration thresholds and impose rules of conduct. Without diminishing the importance of quality assurance, the Subcommittee concluded that the contaminated sites regime can be improved by creating an independent body of private, expert professionals who, with appropriate quality assurance safeguards, can provide timely and cost-effective advice respecting whether regulatory instruments (eg., Certificates of Compliance, Approvals in Principle) should be issued.

At the same time, the Subcommittee was not convinced that a full self-regulating profession model (analogous to legislation establishing APEGBC) is appropriate, at least not in the immediate future. Such a self-regulating system, to be practical, would require substantially different statutory and other arrangements, with commensurate political will to enact such legislation, which cannot be realistically achieved in the near future, eg. the coming year or two. This is not to suggest, however, that a statutory-based self-regulating model should not be seriously considered in the mid or longer term.

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[5] See: http://www.apeg.bc.ca/aboutus/cs/contam-sites.html

[6] See: http://www.apeg.bc.ca/aboutus/cs/LicensedEnvironmentalProfessional.html

The Recommendations Report therefore proposed a hybrid model that provides more independence than the current administrative arrangement with the Ministry, yet maintains a close working relationship with the three parent organizations. Using the hybrid model as the template, the Recommendations Report made the following recommendations:

Features of Recommended LEP Review System
Development Effort and Flexibility: • Build on existing RPE Framework • Build in flexibility in order to adapt to varying market needs • Allow for potential evolution into a fully independent and self-regulated system in the future
LEP Independence and Professional Conduct: • Require registration by existing Regulatory Body (APEGBC, BCIA, CAB) • Provide high degree of administrative independence • Accommodate the use of professional judgment • Foster broad-based professional community for management of Contaminated Sites
LEP Practice Review Functions: • LEP review process may be either "arm's length" review or "self-assessment" in accordance with guidelines to be developed and/or accepted by the LEP Board • Allow proponent-based selection of LEP practitioner within "conflict of interest" guidance (i.e., allow site owner/manager to select LEP) • One category of LEP ("One-Window" Model) is preferred, vs. multiple distinct LEP categories, subject to further feasibility assessment • Provide recommendations to Ministry for issuance of regulatory instrument • Provide synoptic information to the Registrar for updating Site Registry information by the Registrar
LEP Board Administrative Responsibility: • Assess and appoint LEP members • Conduct performance assessments of LEP submissions for quality assurance and appropriate disciplinary actions, including referral to the appropriate umbrella licensing organisation of the individual if necessary • Investigate legitimate public complaints • Establish membership, examination and other related fees
Shared Ministry/LEP Board Administrative Responsibility: • Develop protocols, policies and guidelines for LEP operation • Protect against undue liability

• Establish a new fee structure to support the LEP system • Collection of fees and management of budgets
Ministry Administrative Responsibility: • Issuance of regulatory instruments • Site profile evaluation, and Site Registry operation and maintenance • Review of "High-Risk" sites as defined by the Director • "Oversight" audits of the new LEP system
LEP Board Operating Budget to be funded by following: • "site-owner-paid" submission fees • LEP individual membership/examination fees • Government

The *Environmental Management Act* was brought into effect on July 7, 2004. It incorporates the *Waste Management Act* in a rollover that was effected in three stages:

- in the spring 2003 session of Legislative Assembly, many provisions of the *Waste Management Act* were replicated in Bill 57 (2003) under the heading of the *Environmental Management Act*, but were not brought into force until July 7, 2004;

- in the spring 2004 session of the Legislative Assembly, amendments to the not-yet-in-force *Environmental Management Act* were made through Bill 13, the *Environmental Management Amendment Act*; and

- on July 7, 2004, most of the *Environmental Management Act* and certain sections of the *Environmental Management Amendment Act* were brought into force by regulation, effectively repealing the *Waste Management Act*. Also on that date, regulations were enacted to reflect the change of name and section numbers in the text of the *Contaminated Sites Regulation*.

For the purposes of the Ministry's reliance on qualified professionals, (including, eventually, LEPs) the shift from the *Waste Management Act* to the *Environmental Management Act* has had the following legal effects as of July 7, 2004:

- the following definition of "approved professional" has been added to the definitions section 39(1) of the *Environmental Management Act* (Part 4 – Contaminated Site Remediation): "a person who is named on a roster established under section 42(2)." This definition replaces "qualified professional";

- in Bill 57, the original section 42(1) of the *Environmental Management Act* read as follows: "A director may designate classes of persons who are qualified to perform activities that under the regulations or a protocol may be or are required

to be performed by a qualified professional." These "activities" have now been expanded and amended. Section 42(1) now reads (as a result of Bill 13): "A director may designate classes of persons who are qualified to perform classes of activities, prepare classes of reports and other documents or make classes of recommendations that by or under this Act may be or are required to be performed, prepared or made by an approved professional";

- under section 64(1)(o.1), a director may now establish protocols "summarizing or specifying activities, including the preparation of specified reports or documents, that may or must be performed by an approved professional" ;

- under section 10(1) of the *Contaminated Sites Regulation*, "manager" has been replaced with "director," and "an approved professional" replaces "a person listed on the roster established under section 49.1".

Other provisions in the *Environmental Management Amendment Act* have not been brought into force, but could affect LEPs when they are brought into force through regulation. Most notably, these provisions pertain to "summary of site condition". The Ministry contemplates that approved professionals (i.e., LEPs) will eventually prepare summaries of site condition, specifically:

- under sections 39(1) and (3), a "summary of site condition" will be defined to be a document that must be prepared and signed by an approved professional, in the form established in a protocol, and in accordance with the minister's requirements;

- under section 64(2)(m), a director may establish protocols regarding the format for summaries of site conditions;

- in making a determination of a contaminated site under section 44, a director will be able to rely on a summary of site condition; and

- under section 53, a director may also be able to rely on summaries of site condition in issuing Approvals in Principle and Certificates of Compliance.

Issues respecting summaries of site condition are addressed below in Parts 8.4 and 11.2.2.

3.0 USE OF A SOCIETY AS THE LEGAL FOUNDATION

3.1 General

The RSC, the Subcommittee and Ministry have concluded in previous work that LEPs - or "approved professionals" under the *Environmental Management Act* - should be organized on a more independent legal footing than is now the case under the RPE system. To this end, the Subcommittee evaluated two alternative legal foundations that have the potential of implementing the key elements of the proposed LEP system. The key elements of the proposed LEP system, as detailed below in Parts 4-12, include a multi-stakeholder board with powers respecting member qualification, practice guidelines, public complaint, professional conduct, and performance assessment.

The two alternative legal foundations that can serve as the basis for the LEP elements are:

- a society under the *Society Act;* and
- a self-regulating body established by legislation.

The society and legislative models differ in several material respects. The following three differences have particularly significant practical implications for implementing the proposed LEP system:

- **timing** – while adequate lead time is necessary for drafting both a society and legislation, the timing of the former is largely in the hands of the society applicant. The applicant's task is to satisfy the criteria set out in the *Society Act*, as administered by the Registrar of Societies (who ultimately approves or rejects the application). The path is more uncertain for legislation – legislation is prepared by the legislative counsel at the Ministry of the Attorney General and adoption is a function of political priorities of the Legislative Assembly. The timing issue is discussed in Part 3.2 below;
- **liability** – *Society Act* rules govern the extent to which a society may provide (limited) liability protection to its members and directors. The legislation model provides a potentially broader scope of liability protection (both for directors/officers and members), but this depends on the political will of the Legislative Assembly (as discussed in Part 3.3 below); and
- **flexibility** – very different rules and conventions govern the extent to which a supervising board – whether established by a society or by legislation – can amend its own bylaws and guidance documents. This flexibility is discussed in Part 3.4 below.

Having considered these and other differences, the Subcommittee favours the society model, at least in the immediate future (the first two years at a minimum). The reasons for supporting the society model are discussed in more detail below in Parts 3.2 to 3.4.

Part 3.5 identifies special drafting considerations for the successful implementation of the society model. Part 3.6 identifies several necessary Ministry commitments prior to start-up. Part 3.7 considers whether a society could ultimately evolve to the statutory-based self-regulating model.

3.2 The Timing Factor

The Subcommittee analysis confirmed the conclusions of its Recommendations Report that the option of stand-alone legislation establishing a self-regulating professional body is unattainable, especially in the near future before the assumed April 1, 2006 start-up date. In practical terms, the RSC (or other proponent of the legislation model) would first conduct its consultations with professional groups and stakeholders and prepare a proposal to government for consideration, perhaps together with draft legislation. Proposals for legislation and drafting are then subject to further internal provincial attention, typically over a one-year cycle, during which competing government priorities are assessed. In this internal work, the drafting of applicable legislation is the responsibility of the Attorney General's legislative counsel and is therefore subject to that Ministry's work priorities. Ultimately, even if draft legislation has gone through these various steps (which could take up to two years), political priorities will determine if a Bill is introduced in and passed by the Legislative Assembly.

Timing is far more certain for applicants seeking *Society Act* approval. Once the RSC (or other applicant) prepares its draft constitution and bylaws, they are submitted as an application to the Registrar. The Registrar reviews the application to ensure that the *Society Act* criteria for approving a society are met. Part of the Registrar's review is a 30-day public notification and comment period, as discussed in more detail below in Part 3.5.3.

3.3 Liability

Liability is commonly a concern for board directors, officers and employees whether they act in a society or statutory-based body. As noted in Part 11 below, directors are increasingly concerned that they may be held personally liable.

In the absence of the more detailed liability review (which is proposed as Stage 3 work under Part 11 below), the Subcommittee considered the following factors for the purposes of selecting either the society or the legislation model:

- Society directors are not afforded the same liability protection typically given to directors of statutorily-based self-governing bodies. For example, an LEP society's directors would not enjoy the statutory immunity provided to APEGBC directors. Specifically, the *Engineers and Geoscientists Act of British Columbia* provides the following protection:

> An action does not lie against the council or any member of the association for any proceedings taken or enforced or attempted in good faith under a bylaw of the association or for anything done in good faith and under this Act.[7]

- This legislative protection for directors and members could serve as a precedent for a new LEP statute. Such protection should not, however, be automatically assumed – proponents of LEP legislation must make the case that such protection is in the public interest.

- Some degree of protection for society directors is found in section 5 of the *Society Act*, which states that a "member" of a society is not, in his or her individual capacity, "liable for a debt or liability of the society". There has been little judicial interpretation of this section in British Columbia, but it is clearly of much less value than the above-noted APEGBC statutory protection. For example, it merely protects members against debts or liabilities (though the extent of "liability" is not defined) of the society itself, not those that the member may be responsible for by virtue of performing work as a member of the society.

- The *Society Act* expressly provides that directors of societies cannot be protected by contract, constitution or bylaws from any liability that would "attach to the director in respect of negligence, default, breach of duty or breach of trust of which the director may be guilty in relation to the society" (section 26(b)). However, section 30 does allow the society to indemnify a director (with court approval) for liability claims if the director acted honestly and in good faith.

- Statutes establishing professional bodies (including the three parent organizations) do not go so far as to provide statutory protection for members who commit a wrongdoing in the course of their professional work, i.e. members who are not performing director or officer functions. Nor does the *Society Act* contemplate such protection.

When considering these factors, the Subcommittee recognizes that at least for director/officer/employer liability protection purposes, the legislation model has arguably more potential. Given the significance of liability exposure (as discussed in more detail in Part 11), it is likely that a society board may consider evolution to a legislative foundation.

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[7] Similar provisions exist for CAB in the *College of Applied Biologists Act* (section 37) and BCIA in the *Agrology Act* (section 34).

3.4 Flexibility

The Subcommittee recognizes that a governing board may, as a practical necessity, wish to amend its bylaws and rules on an ongoing basis. This ability is especially advantageous in the formative years of the LEP organization, as it develops practice guidelines and conducts performance assessments[8].

Societies, in general, enjoy reasonably flexible means of changing their legal foundation and relationship with its members. The courts have stated that a society's relationship with its members is defined by the contract of "bylaws", and is not etched in the stone of legislation. A leading case stated:

> In my view, the rights and obligations [between and among members and the society] remain essentially contractual in nature notwithstanding incorporation. All the *Society Act* does is compels inclusion of provisions governing membership and the like in the by-laws and regulations, but it does not specifically define the rights to membership or the conditions under which it may be revoked. **In that sense it contrasts with professional organizations which are governed by statute. They spell out how a person may become a member and in what instances he or she may be expelled or disciplined.**
>
> **While an incorporated society is governed to some extent by the *Society Act*, the relationship between the members and the society as spelled out in its by-laws is contractual and not statutory.** [emphasis added]
>
> *Ireland* v. *Victoria Real Estate Board* (1987), 13 B.C.L.R. (2d) 97.

The *Society Act* flexibility is evident in its mechanism for amending bylaws. The basic amendment rule is found in section 23 of the *Society Act*: It allows a society to change its bylaws by special resolution, specifically 75% of members' votes, or if the society adopts a system of indirect, delegate or mail voting, 75% of the votes cast in respect of the resolution. This mechanism appears to be a reasonably flexible means for continually updating bylaws.

The registrar of societies must still "accept" the bylaw change before it is effective. This is unlikely to pose a hurdle unless the proposed bylaw is patently beyond the bounds of the society's constitution and mandate.

A related matter pertains to the degree to which the society constitution and bylaws themselves authorize the Board to engage in subsidiary rule-making, i.e. adopt rules or guidance documents outside of the bylaws. This subsidiary rule-making appears to be possible under the *Society Act*. The extent of such subsidiary rule-making power will be reviewed by the Registrar on a case by case basis to ensure that it cannot be exercised to derogate or depart significantly from the bylaws (without the necessary bylaw amendment process described above).

This flexibility does not seem to be available under the legislation model. As a general rule, the legislative framework governing a profession is the domain of the Legislative Assembly, meaning that amendments cannot (unlike the *Society Act*) be effected directly. This lack of flexibility is the subject of current deliberations involving APEGBC and the Architectural Institute of British Columbia: these self-governing bodies are currently undergoing intensive legislative review and drafting with a view, in part, to adopting more streamlined rule-making capacity, i.e., relying less on provincial vetting of changes. These bodies seek to remove the rigidity inherent in legislated rules and replace them with more flexible systems allowing, to some degree, direct amendment of bylaws, codes of conduct and rules.

3.5 Special Drafting Considerations for a Society

3.5.1 *Society Act* and Professional Regulation

Sections 86 and 88 of the *Society Act* specifically allow a group of at least 50 members that has, as one of its purposes, the representation of the interests of a profession, to duly register as a provincial society.[9] Such a group must propose bylaws respecting qualification for admission to membership or a class of membership (such as relevant professional degrees and experience), examinations, ethics, standards of practice and penalties for misconduct, incapacity or incompetence of members.

However, section 89 (2) of the *Society Act* explicitly disclaims government endorsement of such societies:

> Registration of a society under this Part does not signify that the society, its qualifications for admission to membership or its qualified members are in any way endorsed by the government.

It is the opinion of the Subcommittee that this general provision can be rebutted to some extent by evidence of a cooperative relationship with the provincial government. This relationship could be formalized by a Ministry letter of support accompanying the *Society Act* registration or a memorandum of agreement between government and the new society

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[9] This membership number 'threshold' should not prove an obstacle given the flexibility within a society to create classes of membership. That is, if the number of 'practising' LEPs is actually fewer than 50, membership can be expanded by way of non-voting members, associate members, etc. The question of whether non-voting and associate members will be necessary depends on the result of the proposed rollover of Roster Experts to LEPs discussed below in Part 6.4.

confirming that LEP society members will serve (exclusively) as "approved professionals" under Part 4 of the *Environmental Management Act*, S.B.C. 2003 c. 53.

Use of a society for professional group purposes is not uncommon. Several professional bodies in British Columbia, such as the British Columbia Society of Respiratory Therapists and the British Columbia Psychological Association, operate under *Society Act* designation.[10] Other professions, including physicians through the British Columbia Medical Association and engineers through the Consulting Engineers of British Columbia, have created societies as the advocacy adjunct to their stand-alone legislative body. Another example is the Association of Professional Biologists of British Columbia.

Drafting of society documents should also pay particular attention to the *Society Act* "Application for Occupational Title Protection", which must be included with a request for LEP Society incorporation. The application will be reviewed by the registrar of societies and includes confirmation by the applicant that the bylaws provide for such matters as courses of study/examination, penalties for incompetence, geographical distribution of members and, interestingly, a question as to how "consumers" have experienced difficulty in determining the qualifications or standard of qualifications of persons in the occupational group under consideration. This line of questioning presumably ties in with the requirement of the registrar to consider whether creation of a 'professional' society is in the public interest under section 88(2) of the Act. There is little doubt that the LEP designation would meet this public interest test.

A key potential enforcement limitation of the "society" model is that the LEP society cannot create an 'offence' or bring injunctive relief against non-LEPs practising in the field. A true self-governing profession enjoys, through legislation, the authority to enforce its right to practice.

The LEP society, however, may enforce a right to title. That is, the LEP society would be able to under the *Society Act*, to seek injunctive relief against a person using the name of the society or combination of words signifying that the person is a member of the society.

3.5.2 Bylaws

The *Society Act* sets out special provisions that will require attention in drafting society documents. For example, *Society Act* provisions respecting "Occupational Titles Protection" enable, subject to conditions, the LEP society to create bylaws for a complaint and professional conduct process, a performance assessment procedure, and practice guidelines. These and other *Society Act* provisions provide considerable

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[10] The *Psychologists Act* superseded the society in 1977 but was later itself repealed by the 1999 *Health Statutes Amendment Act* as part of the provincial government's preference for 'omnibus' health professional legislation. The psychologists have retained their association but are now founded as a College established by way of the *Health Professions Act* as well. The recent experience of the health professions reinforces the principle that self-governing professions are creatures of statute whose privileges and restrictions are subject to legislated change.

flexibility, especially with respect to the key matters of admission and professional conduct.

The *Society Act* requires that bylaws for a profession include provisions relating to "ethics and standards of practice". A clear statement on "ethics and standards of practice" (i.e., practice guidelines) in the founding bylaws of the society will serve to enhance public confidence and certainty for parties such as potential insurance carriers. Draft by-laws incorporating the necessary practice guidelines (including ethics) should be the subject of Stage 3's work (thus enabling the LEP Board to consider and adopt them at the earliest possible time).

LEP Society rules governing its public complaint, performance assessment and discipline (professional conduct) processes must also be established by bylaw. (The significance of these processes in the overall LEP scheme is discussed below is Parts 9 and 10.) In the course of preparing society documents in Stage 3, special attention must be given to the development of disciplinary rules, given the significant implications for a LEP's livelihood. These bylaws should provide clear rules for the investigation of complaints, monitoring the professional conduct of persons providing LEP services, procedures used to sanction a LEP member, and appeals.

Bylaws should also set out the linkages between the three processes. Although all three processes have unique objectives and should operate independently, they are linked. For example, as discussed in Parts 9.5 and 10.7, a serious apparent breach of professional conduct rules identified in a performance assessment or an external or 'public' complaint investigation may be the basis for a referral to a disciplinary proceeding. These linkages, including the test for referring a matter to a disciplinary proceeding, should be reflected in society bylaws.

A related linkage issue pertains to notification to the parent organization of a finding of professional misconduct. Part 10 below recommends that the society establish, by bylaw, a formal mechanism for advising parent organizations of the conclusion of a disciplinary matter in cases where an LEP member has been found to have breached professional conduct standards. This linkage should be the subject of consultation with the parent organizations by the RSC prior to April 1, 2006.

3.5.3 Timing

While scheduling the establishment of a society is more predictable than is the case for legislation, the Subcommittee notes certain timing considerations which drafters of society documents must anticipate.

One timing matter pertains to the need to seek preliminary guidance from the Registrar of Societies. Before formally applying for a LEP society, early Stage 3 work must include contact with the registrar of societies to confirm whether the bylaws relating to admission, conduct and other matters can refer to yet-to-be-drafted terms or, on the other

hand, whether the bylaws must be submitted as a complete and detailed package. In some cases we have reviewed, it appears that the registrar prefers an inclusive submission with detailed bylaws (see, for example, B.C. Acupressure Therapists' Association). If it is the latter, Stage 3 should allow adequate time for preparing such (more detailed) bylaws. In practical terms, the drafting of these bylaws could take several months, especially if draft society documents are subject to public review and stakeholder consultation. As discussed in more detail in Parts 7 to 10, Stage 3 calls for the development of practice guidelines and performance assessment procedures, many of which must be reflected in society bylaws. Presumably drafters of society documents would consult closely with persons appointed by the Subcommittee (eg. contractors) to ensure that the necessary elements of these guidelines are reflected in the bylaws.

The Registrar's notice and timing rules should also be recognized in scheduling the start-up of the LEP Society. The Registrar requires notices in the B.C. Gazette and in three issues of a newspaper in daily circulation in the province, and three issues of a newspaper located in the city shown in the address of the society, with 30 days for interested parties to respond. This 30-day period should be scheduled shortly. The Registrar receives the application.

The Registry office advises that, assuming no significant public concerns were raised in the 30-day public review period, the turnaround time for at final approval by the Registrar is approximately three weeks. This may be truncated somewhat, if the pre-application consultation with the Registrar takes place. It would be prudent to ensure some time is allotted to consider public concerns arising in the review period.

All applications for societies must include, as a minimum, the proposed constitution, bylaws and list of five first directors. An application under Part 10 (Occupational Title Protection), however, requires this generic information as well as substantially more detailed explanations and confirmations regarding matters such as courses of study and exams for members, conduct and ethics procedures, and an explanation of how incorporation protects 'consumers' in terms of understanding professional standards and qualifications. Again, pre-application consultation with the Registrar will be vital to ensuring that the LEP Part 10 application of this kind is not unduly delayed.

3.6 Confirming Ministry Use of LEPs as "Approved Professionals"

Two matters require particular attention by the Ministry before start-up of the Society. Both matters arise from the "approved professional" provisions of the *Environmental Management Act*. The first matter pertains to whether the Ministry will rely exclusively on LEPs as "approved professionals". As discussed in Part 2.4 above, the "director" at the Ministry may rely on an "approved professional", who in turn is a person "named on a roster" established by the director, under section 42(2) of the *Environmental Management Act*. Similarly, the director may under section 42(1) designate "classes" of activities to be performed, prepared or made by approved professionals. These

provisions are silent on a key question: in the context of contaminated sites, will the director choose an "approved professional" to conduct reviews regarding non-high risk sites if that person is not a member of the LEP society?

This question has a significant bearing on the feasibility of a LEP Society. In practical terms, if the director at the Ministry does not rely exclusively on LEPs for reviews, of non-high risk sites, professionals seeking to conduct reviews may have an incentive to apply directly to the director (and not bother applying for LEP membership). This is especially true if the LEP society imposes fees and professional standards not imposed by the director. If so, there would be a 2-tier system of approved professionals and, at the very least, possible confusion and unfair competitive conditions amongst "approved professionals".

The second issue requiring Ministry attention is the necessary linkage between the director's power to rely on "approval professionals" and LEP members. If, as the Subcommitte proposes, the director will rely exclusively on LEPs as "approved professional" for non-high risk sites, then this intention should be expressly confirmed. That is, the Subcommittee suggests that the director may have to consider a deeming or analogous means to link the Act and the LEP members. Without such an arrangement, the LEP society may suffer from inadequate interest from prospective professionals.

Clarification of these issues could be the subject of a memorandum of understanding between the Ministry and the RSC.

3.7 Evolution from a Society to a Self-Regulating Model

As noted above, the Subcommittee recognizes that a legislation-based professional body, as opposed to a society, has possible advantages (especially for director/officer liability protection, if agreed to by the provincial government). Converting a professional society to a legislative foundation is not without precedent. In the case of APEGBC, the founding Society was subsequently converted to a corporation under self-regulating legislation (see section 3 of the *Engineers and Geoscientists Act*, R.S.B.C. 1996, c. 116).

The Subcommittee further recognizes that the Ministry views a true self-regulating LEP profession as the preferred option. It is therefore likely that a new LEP Board will consider the self-regulating option. Should such discussions take place, the Subcommittee recommends that the Board review and consider:

- the extent of government commitment to legislation and regulations, including timely amendment as required (including whether government is prepared to allow some discretion to the statutory Board to directly amend its own rules and policies);

- whether the legislative base would enhance LEP legitimacy and profile;

- whether the legislative model will produce an unnecessarily high degree of administrative demand (compared with the society model);

- level of recognition and acceptance among current LEPs of the merit of a new "profession" created by a new self-governance statute;

- consultation with, and buy-in from, existing 'parent' professions;

- whether broader enforcement tools available through legislation are necessary; and

- the extent to which broader statutory immunity could be made available to both directors and members through legislation (compared with the society model).

The Subcommittee is of the view that any eventual move from an LEP society to a full self-regulated profession (with its own legislation) must follow a logical evolution. While a society can establish a new 'quasi-profession' with certain self-regulation features, there is a considerable distance between the proposed society and a system based in legislation and which creates, legally, a new profession (as was the case in Massachusetts, which was recommended as a precedent by the Minister's Advisory Panel). The sheer effort of drafting governing legislation (including substantive consultation with LEPs, stakeholders and existing related professions) and moving it through the legislative process should not be underestimated. To illustrate, British Columbia's engineers and architects – already subjects of longstanding governing legislation – have been embroiled in amendments of their governing statutes for a lengthy period, with no definite timeline for enactment yet in place. These professions have member buy-in for act review and revision. One of the key ongoing tasks of the LEP Board may be to begin consideration and consultation with government, members and stakeholders on self-regulation and associated legislation. However, an imposed or accelerated move to self-regulation, especially with an assumed April 1, 2006 start-up, cannot be supported.

3.8 Recommendations for Stage 3 Work

To implement the concepts of Part 3 above, we recommend that Stage 3 work includes:

- preparation of the requisite *Society Act* application to establish an LEP society, taking into account matters identified in Part 3.5; and

- seeking Ministry clarifications identified in Part 3.6.

4.0 LEP BOARD MEMBERSHIP

4.1 The Current RSC Membership

The current RSC consists of the following members:

- APEGBC – three;
- BCIA – one;
- CAB – one;
- Ministry – one; and
- General Public – one.

This balance of RSC membership reflects recent changes (June 2004) instituted by the Ministry, particularly:

- a new seat for a Roster member who is a member of the CAB;
- reduction of Ministry seats from two to one; and
- reduction of the number of seats reserved for members of APEGBC from four to three.

4.2 The Proposed LEP Board Membership

The Subcommittee proposes a somewhat larger and more diversified Board, specifically:

- APEGBC – one member who is also a LEP;
- BCIA – one member who is also a LEP;
- CAB – one member who is also a LEP;
- *one other LEP who is not eligible for membership in one of the three parent organizations;*
- industry – one member;
- local governments – one member;
- environmental group representative – one member; and

- Ministry – one member (*ex officio)*.

The Subcommittee used the following rationale for Board membership:

- **Three Parent Organizations.** There will be a need to seek a uniform approach to regulating professionals. Board members who are not only LEPs but also representatives of the three parent organizations will be instrumental in approving the initial package of LEP elements (ranging from practice guidelines and LEP disciplinary processes). There is a clear need to seek, as much as practicable, an approach which is understandable and acceptable by members from all three parent organizations. The value of directors from the three parent organizations is arguably less important once the LEP body has a settled body of guidelines and processes that do not require close consultation as is anticipated for the period immediately after start-up. The longer-term role of the three parent organization is a matter that the Board may consider with the benefit of experience. (For example, professional representatives on the Board might simply consist of directors elected by LEP Society members.)

- **Capacity for Risk Assessment**. The Ministry is placing increased priority on risk assessment (part of the risk-based remediation standard). Ecological risk assessment is an area in which CAB members are particularly qualified to comment. Similarly, human health risk assessment is an area suitable for the 'other professional' category. Anticipated new interest in these two types of risk assessment explains the seats for CAB and other professionals who are not eligible for membership in a parent organization (as discussed in more detail below).

- **Ministry Participation**. Although the LEP Board is independent of the Ministry, there are strong arguments for providing one seat to a Ministry representative (at least on an *ex officio* basis). The LEP Board setting is an appropriate forum for the interaction that will inevitably occur between the Ministry and LEPs as the system evolves. We anticipate that there will be an ongoing need for the Ministry to inform LEP members (through the LEP Board) of evolving policies and regulations and Ministry expectations. Moreover, it will be necessary for the LEP Board to advise the Ministry of concerns and opportunities respecting LEP involvement. And, given the Ministry's desire to eventually implement an LEP system that is fully self-regulating (as opposed to the 'hybrid' society of the proposed system), ongoing communication on this subject will be necessary.

- **'Other' Professionals**. The LEP membership should be open to the relatively small contingent of professionals (i.e., chemists, toxicologists) who may not be eligible to attain membership in one of the three parent organizations. (Qualification of these 'other' professionals is discussed in Part 6.3 below.) We propose that one LEP Board seat should represent these professionals. At this stage, we propose that the initial responsibility for appointing this 'other' professional rests with the Board (as one of its first tasks upon convening). This

appointment should occur within a reasonable time after at least one of this category of professional is admitted to LEP membership and the mechanism for doing so can be established by bylaw.

- **Broader non-LEP Representation**. Work conducted in earlier stages identified how other jurisdictions commonly use multi-stakeholder boards to oversee the work of LEPs. These boards comprise a broad range of stakeholder representatives to safeguard public and private (eg., industrial property owner) interests. (See, for example, the 'Considerations' Report discussed in Part 2 above.) The Subcommittee recommends a similar approach for the British Columbia LEP system. In line with the experience in other jurisdictions, industry groups, municipalities and environmental groups in British Columbia may have an interest in participating in the LEP Board. We recommend that, for each of their respective sectors, a leading ENGO, municipal and industry group be identified to consult with related groups to determine of their own accord whether to appoint or elect their respective member. (The mechanics of such appointment or election are discussed in Part 4.3 below).

- **Balance of LEP/non-LEP Directors.** To strike a balance of LEP and other representatives, the Subcommittee considered guidance provided by the provincial government's Board Resourcing and Development Office (the Division of the Premier's Office charged with guiding provincial appointments to agencies, including vetting Lieutenant-Governor appointments to the Boards and Councils of self-regulating professions). According to the Office, the government's preference is that one-quarter to one-third of the members of such bodies should comprise public 'lay' members. This ratio has been mirrored in the proposed LEP Board membership: approximately two-thirds LEPs and one-third non-LEPs. [11]

- **Manageable Size**. The Subcommittee recognizes that other interests could be represented on the Board. However, a larger board may create administrative inefficiencies.

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[11] The experience with a Board established in this way should prove valuable to the LEP system should it evolve into a true self-regulating profession, which would be expected to similarly provide for a certain number of Cabinet or other 'lay' appointees. That is, in recommending this structure we have acknowledged not only the need for fair representation of interests, but also the government's desire that the proposed LEP system may eventually evolve into a self-regulated profession with additional 'public interest' responsibilities.

4.3 Mechanics for Establishing the Board as of April 1, 2006

Stage 3 should, in part, take necessary preparatory steps to ensure that the founding directors are selected informally prior to the assumed April 1, 2006 start-up date, leaving the formal appointment to be effected by *Society Act* rules at or shortly after start-up. For example, the following preparatory steps should be taken:

- **Directors from the Three Parent Organizations**. Stage 3 work should consider the following two basic options:
    - the three parent organizations each appoint their respective director (who, as discussed in Part 4.2, is also an LEP); or
    - the LEPs who qualify as of April 1, 2006 would select their respective director, eg, APEGBC LEPs would elect their director, etc.
- **'Other' Professionals**. Stage 3 should propose some potential candidates for consideration by the Board. The Board would be responsible for appointing this director.
- **Three Sectoral Interests**. Board members representing industry, municipalities and environmental non-government organizations ("ENGOs") could be appointed directly from applications received from prominent organizations representing those sectors. (At this stage at least, the Subcommittee proposes that the Canadian Petroleum Products Institute (CPPI) take on the role of coordinating input from industry and the Union of BC Municipalities (UBCM) and West Coast Environmental Law Association take on similar coordinating roles for local governments and environmental organizations, respectively. (These roles would be confirmed in the course of preparing the Stage 3 work, particularly whether groups such as CPPI, UBCM and West Coast Environmental Law are willing to carry out the respective coordinating roles.)

4.4 Director Terms of Office

Stage 3 should also evaluate whether there is merit in having a 12-15 month initial term (which would be specified in the bylaws). For the transition year, for example, the three parent organizations would appoint Board representatives for the period prior to the society's first annual general meeting. (The *Society Act* requires an annual general meeting within 15 months of incorporation, and subsequently at least once in every calendar year.)

The Subcommittee proposes that subsequent terms should be at least two and possibly three years. A transition period may be especially attractive if a temporary Board is used pending elections by LEPs and appointments by the three sectoral interests. If a transition term is used, bylaws should specify that after the first (transition) year, LEP members will directly elect their respective LEP Board directors. That is, APEGBC LEP members will elect their Board director, BCIA LEP members will elect their Board member, etc.

4.5 The ASTTBC Proposals

The Subcommittee received a submission from the Applied Science Technologists and Technicians of British Columbia ("ASTTBC") proposing that this organization be considered as a fourth parent organization.[12]

The Subcommittee has, for the purposes of developing the Framework, assumed that the three parent organizations would be APEGBC, CAB and BCIA. This assumption has been the subject of a significant amount of consultation between the RSC and Ministry over the past several years. These discussions have, in part, reviewed the professional competencies of APEGBC members and, more latterly, those of BCIA and CAB members. These reviews led to the assumption that those three bodies will serve as parent organizations of the LEP system.

The Subcommittee therefore concludes that the ASTTBC proposal requires further consideration, not only by the Subcommittee, but also by the three parent organizations and the Ministry. As was the case for the three parent organizations, there should be a detailed review of issues such as whether:

- ASTTBC members have equivalent 'professional' safeguards;
- ASTTBC membership criteria are sufficient;
- ASTTBC members are able to perform work in a broad spectrum of contaminated sites issues within the scope of a Roster Expert/LEP review;
- ASTTBC members can meet a niche demand;
- the existing "limited licensee" opportunities available to ASTTBC members through the three parent organizations suffice to ensure further contributions by these members; and
- a fourth parent organization representative on the LEP would be redundant (given that qualified ASTTBC members can be limited licensees of APEGBC).

A comprehensive review of ASTTBC's proposal cannot be achieved within the current scope of the Framework, which presents a high-level plan for implementing a LEP system.

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[12] Applied Science Technologists & Technicians of BC, *British Columbia's New Licensed Environment Professional Framework draft dated September 1, 2004*, September 30, 2004. The ASTTBC made several recommendations in addition to its proposal to be involved as a fourth parent organization.

4.6 Committees of the Board

The LEP Board will undertake more work than is presently required by the RSC members (see Part 5.0 "LEP Board Functions"). While the present RSC may be considered a "working" board in that the RSC members complete much of the work as a single group, the preference for the new board will be one of delegation. To this end, the delegation of authority to committees or individuals and hiring/contracting of support staff is expected to correspond to the functions set out in Part 5. As detailed in that Part, delegation and staff/contractor support may be especially necessary for key Board functions such as:

- performance assessments;
- development of practice guidelines and other administrative tools;
- Ministry relations, including taking on new functions respecting Summaries of Site Condition and Site Registry entries; and
- LEP qualification/renewal and discipline.

We recommend that Stage 3 work include preparation of a committee structure and functions for consideration by the Board. (The committee structures do not need to be reflected in Society bylaws, thus allowing the Board to evolve its governance with experience.)

4.7 Recommendations for Stage 3 Work

The Subcommittee proposes that Stage 3 should include the necessary preparatory work to ensure that the LEP Board has full operational capacity as of April 1, 2006. Stage 3 would specifically:

- prepare a practical transition roadmap for installing LEP Board members on the day of LEP establishment (per Part 4.3);
- seek CPPI, UBCM and West Coast Environmental Law cooperation to sit on an LEP Board and act as liaison with their respective constituencies (or conversely, develop options in the event that these groups do not wish to represent their sectoral interests in the manner proposed in Part 4.3);
- prepare draft Society bylaws to reflect the concepts and principles of Parts 4.1 and 4.3 above;

- evaluate the lengths of terms for directors and related term issues (such as whether terms should be staggered and whether a (shorter) transition term should be used at the outset (as discussed in Part 4.4 above);

- prepare draft terms of reference for committees of the Board (as identified in Part 4.6); and

- hold further discussions, if directed by the RSC, on the potential role of the ASTTBC as a parent organization with representation on the Board (as noted in Part 4.5); and

5.0 LEP BOARD FUNCTIONS

5.1 Functions Similar to the Current System

We propose that the LEP Board or through delegation to committees will perform, many of the functions now exercised by the RSC when administering the RPE system.

These similar functions are as follows:

Roster Steering Committee	LEP Board
• Administrative upkeep and maintenance of the roster	• Administrative upkeep and maintenance of LEP membership
• Advising roster candidates of the required qualifications, examining procedures, duties, responsibilities, obligations and disciplinary procedures associated with appointment to the roster	• Advising member candidates of the required qualifications, examining procedures, duties, responsibilities, obligations and disciplinary procedures associated with appointment to the roster
• Verifying and documenting qualifications related to professional membership and work experience	• Verifying and documenting qualifications related to professional membership and work experience
• Setting and marking the contaminated sites professional examination	• Setting and marking the professional examinations, including setting minimum scores for member qualification
• Examining potential roster candidates	• Examining potential member candidates
• Recommending to the Director, roster candidates to be appointed to, or roster members to be removed from, the roster	• Admitting, discipline and removal of members
• Conducting and reporting to the Director the results of audits and investigations of roster members.	• Conducting audit-type function in "performance assessments" of members (subject to comments in Part 5.2 below)

5.2 New Functions

Reflecting the increased independence of the proposed LEP system, the LEP Board and its committees will likely take on the following new or enhanced functions:

- **Performance assessments.** Although the Board's performance assessments are generally analogous to the RSC's audit function, there will be at least two significant differences: the LEP Board will likely conduct substantially more performance assessments than is now the case with respect to RPE audits; and, unlike the current RPE system, the LEP Board will have exclusive responsibility for performance assessments (i.e., without Ministry involvement, as is now the case). The details of the proposed performance assessment function are discussed below in Part 9.0. Part 13.1 provides rough projections of the likely number of performance assessments.

- **Practice guidelines.** A significant deficiency in the current RPE system is the absence of practice guidelines. Specific examples of such gaps, and potential solutions, are discussed in Parts 7, 8 and 12. A priority for the new LEP Board is the finalization and adoption of practice guidelines (a draft of which would be prepared in Stage 3).

- **Education of members.** It is anticipated that a high priority for a new Board will be to provide ongoing education to both prospective and new LEP practitioners on topics such as practice guidelines and performance assessments.

- **Insurance requirements.** We propose that the Board in the longer term review the feasibility of imposing an omnibus minimum insurance requirement on all LEPs. For the reasons discussed in Part 6.4, the Subcommittee recognizes that although insurance could play an essential role in protecting LEPs, market conditions at present suggest that it is not feasible to expect all new LEPs to acquire insurance as of April 1, 2006. Part 6.4 also notes the Subcommittee preference, at least in the immediate future, of an insurance disclosure requirement falling short of mandatory coverage.

- **LEP fees.** The Board will have responsibility for assessing and collecting fees related to examination and membership. Cost recovery generally, including fees from LEPs, is discussed in Part 13 below.

- **Liaison with the Ministry on new roles for LEPs.** The Ministry seeks more active involvement of LEPs, including activities that depart from the current RPE approach of merely giving advice on applications for regulatory approvals. The LEP Board is an appropriate forum for these discussions. Three such discussion items include:

    - **LEP role in entering information on site registry.** Ministry has stated its intention to request a more active role by LEPs in entering information

in the site registry[13]. The terms of this potential new role for LEPs will likely be an issue to be addressed by the Board; and

- **LEP duties and responsibilities respecting "Summaries of Site Condition".** Similarly, the Ministry has indicated its desire to have LEPs prepare such Summaries (which have no equivalent in today's regime)[14]. These discussions and negotiations (including liability implications) will likely be a key function for the LEP Board. Part 8.6 discusses "Summaries of Site Condition".

- **Liason with Ministry on new liability principles.** The Ministry intends to review the contaminated sites liability regime. New liability principles might affect LEPs (eg. allocation of liability might call for LEP involvement), and therefore the LEP Board may wish to consult with the Ministry on such issues.

- **LEP reviews of screening decisions.** The Ministry has in the past year indicated its intention to revisit the 'trigger' events that cause sites to fall within the contaminated sites regulatory regime. While this work has not advanced as far as other initiatives, it is likely that Ministry will review LEP involvement in the trigger decisions, including the role of LEPs in the municipal development approval process. Similarly, the Ministry intends to develop a system of site categories (1 to 4, with higher risk associated with the latter), and LEPs may be called upon to review decisions by owners respecting the status of their sites (even absent an application for regulatory approval).

- **Setting 'other professional' qualifications and screening** (i.e., for experts who are not eligible to qualify for APEGBC, BCIA, or CAB membership). This new function is discussed in Part 6.3.

- **Ministry audits**. As discussed in Part 9.0 below, the Ministry will likely conduct audits of the Board's performance assessments (i.e., an 'audit of the audit'). The Board will thus be requested to communicate with the Ministry on the Ministry's audit findings. (Ministry audits are discussed in Part 9.)

- **General Financial and Administration.** This function includes hiring and remuneration of staff and managing contractors as necessary. Part 13 identifies several financial considerations that will be paramount for an LEP Board, especially at the outset.

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[13] "A New Contamination Sites Regulatory Process Investigation, Classification and Remediation Process Overview", Ministry of Water, Land and Air Protection, October 22, 2003, at 14.
[14] *Ibid.*

6.0 LEP Membership

6.1 The Current System

The current RPE system applies the following criteria for roster membership:

- APEGBC or BCIA membership. Professionals who do not qualify for membership in APEGBC may seek qualification as a "Limited Licensee" of APEGBC;
- a minimum of 10 years' experience in contaminated site work, of which 8 years must be at the professional level;
- professional liability insurance, naming the Ministry as beneficiary, in an amount designated by the Director (currently $2,000,000);
- passing grade (as established by the RSC) on a written examination (currently comprising a technical portion and regulatory portion); and
- appointment to the Roster by the Director (of the Ministry) on recommendation from the RSC based on a review of qualifications and examination.

6.2 Proposed New Criteria

The Subcommittee proposes that, for the most part, the LEP Board should continue to use the current criteria (identified in Part 6.1). The key differences for the proposed system are as follows:

- **CAB membership**. Professional biologists who are members of CAB possess unique expertise (notably in ecological risk assessment) and should accordingly be eligible for LEP membership. In fact, CAB membership has recently been accepted as a criterion for RPE membership. CAB members will, for the first time, be able to write the RPE examination in Spring 2005;
- **'Other' professionals.** A special arrangement will allow for entry of qualified specialists such as toxicologists who are not eligible to qualify for membership in one of the three parent organizations (see Part 6.3 below);
- **Re-assessment of the 8/10 year experience rule.** The Subcommittee identified numerous concerns about the efficiency and fairness of the current 8 and 10 year rules (described in Part 6.1 above) and how the number of years is calculated. For example, RPE professionals and others noted that some highly skilled professionals may not have gained the requisite years. A related fairness issue is that time criteria apply differently to persons seeking professional designation in

the three parent organizations, e.g. APEGBC members have a longer period of required experience prior to achieving "P.Eng." designation; and

- **Insurance.** Rather than mandatory liability insurance coverage, insurance disclosure and acknowledgement requirements will apply when an LEP is retained by a client (discussed in 6.5 below). This mandatory insurance disclosure requirement would not be used as a criterion for entry into the LEP membership.

In summary, therefore, the proposed new criteria are:

- APEGBC, BCIA, or CAB membership;
- a significant amount of experience in contaminated site work (number of years and method of calculation to be determined in Stage 3);
- passing grade (as established by the Board) on a written examination. A minor change from the current RPE system is that instead of two basic components, the examination would have three components: regulatory context; technical application of numeric standards; and technical application of risk assessment. The regulatory context component would be mandatory, and the applicant would have the option of writing one or both of the other two components;
- appointment as confirmed by Board (on a review of qualifications and examination); and
- for other qualified specialists who are not eligible for membership in APEGBC, BCIA, or CAB, LEP registration would be subject to special arrangement (see 6.3 below).

6.3 Special Arrangement for Professionals who are not Members of the Three Parent Organizations

The Subcommittee recognizes that the investigation and remediation of many contaminated sites may require the application of unique expertise possessed by persons who do not qualify for membership in one of the three parent organizations (including these organizations' limited licensee provisions). Toxicologists, for example, may be uniquely qualified to apply human health risk assessment standards, but nonetheless might not be eligible for qualification in one of the three parent organizations (even as a limited licensee). The Subcommittee is concerned that a new LEP system should be designed to allow such experts to apply for and become LEPs.

The Subcommittee recommends that LEP applicants who are eligible for membership in one of the three parent organizations (including limited licensees) be required to join one of those professions as a pre-requisite to becoming a LEP. Only in cases where this is not

possible should the latter option – special admission provisions – be preferred. For these cases, the Subcommittee proposes that the special admission requirements include:

- demonstration by the applicant of an adequate understanding of professional conduct generally expected of LEPs (recognizing that these LEPs might not belong to an organization which imposes professional conduct rules);
- passing any exam that the Board may impose for these professionals;
- membership in an appropriate professional or academic organization. The LEP Board may wish to make membership in a professional or scientific organization mandatory as a prerequisite to admission[15]. Accordingly, the Stage 3 work should identify such organizations to assist the Board in screening these applicants; and
- demonstration that the applicant is not eligible for registration in the three parent organizations (including limited licensee status).

6.4 Rollover of RPE to LEP Status – Ensuring Capacity as of April 1, 2006

The Subcommittee recognizes that property owners will legitimately expect to be able to retain LEPs immediately after the new LEP system is established. The Subcommittee also recognizes that owners should be able to choose from candidate LEPs and that LEPs with sufficiently diverse expertise to conduct a wide array of reviews. In short, there is a practical need to appoint a broad base of LEPs immediately on or shortly after the presumed start-up date of April 1, 2006.

To deal with this need, the Subcommittee reviewed three options:

(a) an aggressive screening and admission of LEP candidates immediately after start-up;

(b) grandparenting of current Roster Experts; and

(c) testing/screening of prospective LEPs (irrespective of whether they were Roster Experts) for a specified period prior to LEP start-up (April 1, 2006).

Option (a) is not favoured by the Subcommittee because the potentially lengthy time required to review (likely many) applications immediately after start-up could unfairly cause delay to those property owners who seek reviews immediately after start-up.

Securing the necessary capacity can likely be achieved with either option (b) or (c). Specifically, the period of late 2005 and early 2006 could be used to take the necessary

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[15] For example, the Society of Toxicology of Canada. This Society admits members whose academic qualifications include M.Sc., Ph. D., D.V.M. and M.D. degrees. Regular membership is restricted to qualified individuals who have a continuing professional interest in the field of toxicology.

steps of confirming which persons will be LEPs as of the presumed start-up date of April 1, 2006.

On balance, the Subcommittee prefers option (b), primarily because many Roster Experts have recently passed examinations on the Contaminated Sites Regulation and have satisfied other requirements of qualification set out above in Part 6.2. That is, the Subcommittee rejected option (c) because of the likely duplication and cost association with administering these qualification processes anew.

When applying option (b), however, the RSC and (after start-up, the new Board) should not automatically confer LEP status). The Subcommittee proposes that the RSC undertake a pre-start-up program which notifies Roster Experts of the opportunity to obtain LEP status and, in turn, require Roster Experts to confirm that they accept LEP rights and obligations as of start-up (and thus become members of the LEP Society). In addition, it is proposed that the grandparented LEPs must, to retain their status, attend all professional development workshops arranged by the new LEP Board within a specified period (eg., one or two years). These workshops will be of considerable importance, as they will deal with new matters not found in the current RPE system (most notably, performance assessments and practice guidelines).

The RSC could arrange an analogous pre-start-up admission opportunity for 'other' professionals discussed in Part 6.3 The pre-start-up rollover for these professionals would be carried out after preparation of the special arrangements discussed in Part 6.3. These arrangements are necessary to ensure that the LEP membership includes these types of professionals from the outset. In practical terms, this pre-start-up arrangement would take an extended period of time: It would require the RSC to first prepare the necessary admissions requirements, then give notice to prospective LEPs, and finally administer an admissions process.

6.5 The Insurance Condition of Entry

The Subcommittee evaluated the appropriateness of using the current ($2 million) insurance coverage criterion as a basis for LEP membership. The Subcommittee therefore concluded that imposing an omnibus insurance requirement on all LEPs may have the perverse effect of blocking entry by many types of professionals whose participation would be necessary in LEP reviews.

In reaching this conclusion, the Subcommittee found that the insurance industry is in a state of flux, making it difficult to predict which products will be available, especially for LEPs who are members of organizations which do not now require insurance. On the basis of a preliminary review of the insurance industry, the Subcommittee understands that insurance coverage may simply not be available at all or will be prohibitively expensive for some LEPs.[16] More particularly, the Subcommittee recognizes the potential difficulty in obtaining insurance by those LEPs who may not be members of one

[16] Meeting with Insurance Bureau of Canada (BC) (Liability Committee), September 14, 2004.

of the three parent organizations or who practise as 'sole practitioners' or in smaller offices. Moreover, the Subcommittee understands that BCIA and CAB members are not required to carry insurance today and it may take some time for insurers to consider whether to provide insurance to these LEPs.

The Subcommittee also proposes that because insurance is a highly desirable means of protecting against liability, the LEP Board should revisit if and how an omnibus insurance requirement could be implemented. To do so will likely required further discussions with insurance providers to determine under which conditions insurance could be made available. To assist the new Board in these discussions, we recommend that Stage 3 provide the Board with a detailed analysis of the pros and cons of establishing a mandatory insurance requirement for all LEPs, including an analysis of the current insurance market and product types, availability and affordability.

Given the potential difficulties associated with imposing an omnibus insurance requirement, at least in the immediate future, the Subcommittee considered the option of 'mandatory disclosure'. Under this option, the LEP (and all LEPs contracted by the Lead LEP would be required to disclose, in writing, his or her liability insurance status (or lack of insurance) to clients prior to entering into an agreement or commencing work. British Columbia's architects and engineers/geoscientists are currently required by their respective codes of ethics and bylaws to make this disclosure; engineers and geoscientists are further required to obtain the client's signed acknowledgement that this status has been communicated. (In the case of APEGBC LEPs, the disclosure would indicate the mandatory insurance required by APEGBC.) The Subcommittee therefore concluded that the mandatory disclosure of insurance status model with client acknowledgment is a satisfactory approach for the purposes of establishing the LEP system, especially over the short term.

6.6 Recommendations for Stage 3 Work

Stage 3 work arising from this Part of the Framework should include preparation of:

- draft special admission provisions for the 'other' professionals described in Part 6.3, including:
    - demonstration of understanding general professional conduct expectations applicable to members of the parent organization; and
    - membership in relevant academic or professional organization;
- draft insurance disclosure and acknowledgement form (per Part 6.5);
- review the feasibility of a mandatory insurance coverage requirement; and
- draft three initial sets of examinations (regulatory, numeric standards, risk-based standards), including review of sufficiency of existing examinations.

Additionally, a key task for the RSC in Stage 3 is to effect the rollover of Roster Experts to LEPs, as proposed above in Part 6.4.

7.0 TYPES OF PROFESSIONALS

7.1 The Need for Diverse and Specialized Expertise

The investigation and remediation of contaminated sites typically require the application of diverse and specialized expertise. The Subcommittee believes that cost-effective access to all relevant expertise is an essential precondition to the successful establishment of the LEP system. Morever, adequate access to LEP expertise must be available from the outset because owners will be required to support their applications for regulatory approvals with LEP reviews. Achieving the necessary comprehensive capacity in the LEP system therefore represents a priority task, particularly in the preparatory Stage 3. This capacity must exist for both types of basic standards found within the contaminated sites regime, namely numeric and risk-based remediation standards.

7.2 The Ministry's Proposal

The Subcommittee paid particular attention to the Ministry's recent proposal to create two categories of specialists, each associated with a remediation standards approach, namely:

- "risk assessment specialist"; and
- "standards assessment specialist" [Charles Porter letter, June 15, 2004].

The Subcommittee presumes that the general intent behind this two-category system is to expressly recognize the important contribution of risk assessors (to reflect the Ministry's support for the risk-based approach). The Subcommittee shares this concern, and is of the view that the RPE system has not sufficiently developed this capacity. The risk assessment capacity must be developed for the simple reason that many sites are and likely will be remediated using the risk-based standards approach. Coordinating the work of these two types of specialists is discussed below in Part 7.3.

7.3 The Recommended 'Lead LEP' Approach

The Subcommittee has concluded that cost-effective and coordinated application of specialized expertise can be achieved with a 'lead LEP' approach'. The following principles should inform the lead LEP approach:

- A lead LEP must conduct the review. The model under consideration is akin to the 'project manager' approach generally used in engineering consulting. Under this approach, a single designated professional co-ordinates a team of professionals or sub-contractors who sign off on their individual scope of work.

- The lead LEP must turn to other specialists if not qualified to conduct reviews in certain areas. For example, on the basis of the entrance examination, an LEP may be qualified as a specialist in the application of the numeric remediation standards, but not in risk assessment. (Qualification is determined essentially by the entrance examinations.) If this LEP is asked to conduct a review of an application involving both sets of standards, he or she must arrange for the specialized assistance from another LEP qualified to review risk assessment.

- The lead LEP must document how he or she considered whether the issues raised in the application fall within his or her expertise, and, if not, the necessary steps taken to obtain and rely on the expertise provided by other LEPs.

- A LEP may rely on other laboratory results and background reports relied on by the owner's consultant, subject to specified conditions. Reliance on secondary documents is not a new problem – it has been the subject of correspondence between the Ministry and the RSC. The Ministry has confirmed that reviewers "are not required to carry out exhaustive investigations of [background] work... unless they have reasonable cause to believe errors or oversights exist in that body of work."[17] As reviewers in a "one-window" model, LEPs require further clarification in practice guidelines as to their duties and corresponding liability when relying on background information. Such practice guidelines are commonly found in LEP systems found in other jurisdictions[18].

- A LEP qualified to review matters involving numeric standards, but not risk-based standards, may nonetheless review the latter standards to a limited degree. To illustrate, an important new tool being developed by the Science Advisory Board is the "Preliminary Screening Risk Assessment", which is designed in part to more readily determine risk-based issues; this tool essentially uses a 'check-box' methodology (rather than more elaborate application of risk-based science). It is arguable that the numeric standards specialist should be able to apply this risk assessment tool without having to go to the time and expense (ultimately borne by the owner) to consult with an LEP qualified to work on risk-based issues.

The lead LEP model is consistent with the above-noted Ministry intention to recognize two distinct types of LEPs (each corresponding to the numeric and risk-based standards approaches of the Contaminated Sites Regulation). In particular, a LEP will only be qualified to conduct a review of how a particular standard is applied if he or she passes the relevant admission examination respecting that standard. (The new examination system would allow the applicant to write one or both of the numeric and risk-based standards examinations.) And, as noted above, the lead LEP who is qualified to review issues under one standard must seek qualified LEPs to review issues respecting the other standard.

The Subcommittee is concerned that, without the lead LEP concept, the two-category system of specialists proposed by the Ministry may present significant administrative

[17] Ministry letter to RSC 23 May 2003.
[18] Eg., Massachusetts, Connecticut, California.

challenges. Requiring these owners to retain two sets of LEPs – one for each type of standard – could prove to be redundant and cause delay in many instances. The preferred approach, as suggested above, is to place the onus on the lead LEP to coordinate the necessary expertise. The lead LEP is in the best position to determine, as governed by practice guidelines, if and how to acquire the necessary additional expertise.

Practice guidelines have the additional benefit of serving as a source for fairly apportioning liability in the event that two or more reviewing LEPs (and other non-LEP specialists) are sued jointly. The lead LEP should not necessarily incur all liability in all instances – there may be cases where a LEP who provided limited advice to the lead LEP created the problem giving rise to a civil action. In these cases, compliance with practice guidelines would be a key source for dividing liability fairly. Practice guidelines in other jurisdictions prescribe how an environmental professional may rely on the advice of other professionals upon a reasonable determination of their qualifications.[19] These jurisdictions commonly require that the signature of each of these other professionals be included in the report or opinion, and a description of alternative opinions that were considered and rejected.[20]

The recommended approach of developing practice guidelines to ensure effective coordination of expertise is consistent with the practice now used in the three parent organizations, as discussed below.

7.4 Precedents in the Three Parent Organizations

To varying degrees, the three parent organizations provide guidance for applying and coordinating specialized expertise. The Stage 3 work should examine the existing approaches as possible precedents. At a general level, the Stage 3 work should consider APEGBC's *Code of Ethics*, which states that Engineers and Geoscientists must "undertake and accept responsibility for professional assignments only when qualified by training or experience". Another source of potential guidance is APEGBC's "Professional Practice Guidelines" for particular "P.Eng." disciplines. Another example consists of APEGBC's Guidelines for Electrical, Geotechnical, Mechanical, and Structural Engineering Services for Building Projects – these Guidelines outline the particular tasks that should generally be performed by the specified professional and which are properly coordinated with the work of other professionals. Particularly relevant APEGBC provisions that should be reviewed in Stage 3 work include:

- the responsibilities of each of the project participants to each other and to the project itself, including the Owner, the Coordinating Registered Professional (Prime Consultant), the Specialist, and others involved in the project;

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[19] Massachusetts regulations stipulate: "In providing Professional Services, an LSP may rely in part upon the advice of one or more professional whom the LSP reasonably determines are qualified by education, training and/or experience." Connecticut has a similar provision.

[20] California's Registered Environmental Assessors are subject to these requirements.

- guidelines for Professional Practice outlining services that the Specialist Professional should consider providing as part of good practice including a description of "Basic Services" the Specialist should be able to provide at a minimum; and

- the description of Additional Services that may be provided by the Specialist.

The other two parent organizations provide more general guidance. CAB's *Code of Ethics* stipulates that "the Professional Biologist will offer professional services only on matters in that s/he is qualified through professional training and/or experience." BCIA's *Code of Practice* similarly provides that the "Agrologist" will "practice only in those fields where the Agrologists' training, ability and experience make them professionally qualified." BCIA's By-laws-2004 also allow a "Professional Practice Committee" to "develop standards of competence and expertise for specialized areas of practice."

Stage 3 work should consider these examples in providing similar guidance to LEPs. Although it remains to be seen where similar guidelines will be located in the LEP system (eg. adopted in Bylaws, Performance Guidelines, or separate guidelines promulgated by the Board), they are clearly necessary.

7.5 Recommended Stage 3 Work

Stage 3 work items arising from Part 7 include:

- preparation of practice guidelines respecting:

    - when and how a lead LEP should rely on other LEPs for specialized assistance;

    - due diligence documentation of such reliance; and

    - relying on background studies, i.e., studies not prepared by but relied upon by the owner's consultant; and

- as noted in Part 7.4, review of how three parent organizations provide guidance to their members on the application and coordination of specialized analysis.

8.0 FORMS OF LEP REVIEWS

8.1 The Current System

The current RPE system allows two basic forms of review:

- **"Self-review"** refers to reviews of contaminated site work where the reviewing RPE is actively involved with planning and directing the work, interpreting site data, drawing conclusions and developing recommendations to Ministry regarding the status of the site.

- **"Review of others' work"** includes a review completed by an RPE who has no prior familiarity with the work completed (frequently referred to as "peer reviews"), or, if such familiarity exists, a review by an RPE who was not involved in actively directing investigation and remediation activities at the site. Review of others' work could take two forms: review of work done by co-workers at the same firm; and a pure arm's length review (such as the external reviews now contracted by Ministry).

8.2 The Paramount Consideration: LEP Reviewer Independence

The Subcommittee recognizes that both models of review have unique advantages. The self-review model is most likely to realize time and cost savings because the owner is required to hire only one consultant. The potential risk inherent in this model, however, is that there may be an apprehension of (and possibly a real) conflict of interest in circumstances where the LEP reviews his or her own work. Without adequate safeguards, the self-review model may result in a derogation of public confidence in the LEP system.

Alternatively, the "review of others' work" model implies a higher degree of independence. This type of review, by definition, requires that the property owner retain two sets of consultants to do two distinct sets of work – the consultant conducting the investigations and remediation and the consultant retained to be the reviewing LEP (even if the reviewing LEP is employed at the same firm). Because this model presumes two types of work, it could require a longer period of time before a review is prepared and will typically be costlier. The Subcommittee is concerned that a second layer of environmental review – starting after the owner's consultant has performed his or her work – would create significant timing and other costs for property owners without a corresponding benefit in environmental protection. Moreover, at least for some sites, the costs and potential delay would create a disincentive to remediate their sites.

In evaluating these two forms of review, the Subcommittee concluded that reviewer independence should be a paramount consideration, especially since the LEP system must gain public confidence. As discussed in Part 8.3, the Subcommittee proposes a system

that will allow some degree of self-review (to encourage timely and cost-effective remediation) without compromising the paramount goal of independence.

8.3 Proposed Review System

The Subcommittee recognizes the need for careful development of practice guidelines that clearly set out when it is permissible to conduct self-review (as opposed to reviews of others' work). The development of these practice guidelines in Stage 3 should be informed by the following principles:

- **Protection of the public interest.** Practice guidelines should support the general goal of facilitating cost-effective and timely remediation of contaminated sites.

- **Higher complexity and reviewer independence.** Independence is especially critical where a site poses complex issues not addressed in regulations or Ministry guidance, thus calling for a high degree of professional judgment. Self-review will be permitted in cases where the LEP is required to follow a relatively high degree of legislative or policy prescription. For example, on one end of the spectrum, self-review should be allowed if it pertains to an application for a determination that a site is a "contaminated site", where the review requires the application of numeric standards and there is no reasonable basis for concluding that there is off-site contamination; this is a relatively low-risk situation, especially since it does not involve a review of remediation. Conversely, a higher degree of complexity and potential risk arises in respect of an application for a certificate of compliance that, for example, involves off-site contamination and requires the application of both numeric and risk-based remediation standards.

- **Early involvement by LEP reviewers.** LEP reviewers may and should be encouraged to become engaged in the review at an early stage. Arm's length reviews should not preclude the LEP from giving early advice as to acceptable investigation or remediation, provided the LEP limits his or her involvement to commenting on concepts (without providing specific direction). An example of this would be providing an opinion that further delineation is appropriate, without specifying how the delineation is accomplished (eg., number of test holes, where the test holes should be located). The practice guidelines will address the extent of permitted early advice (i.e. advice which does not constitute control of the work).

  Practice guidelines should address the following aspects of early LEP involvement:

  - Could an LEP conducting an arm's length review suggest conclusions that might be drawn from analysis (eg. identifying potential contaminants of concern)?

- Could an LEP "coach" on regulatory process (eg., notification of independent remediation, or seeking a contaminated soil relocation agreement?

- Could an LEP "coach" on required documentation (eg., manifests, trip tickets, scale records)?

- Could an LEP recommend certain reporting or data presentation or analysis improvements?

- **Conflict of interest guidelines.** The Subcommittee believes that an LEP should, as a matter of general principle, be allowed to review the work of a person employed by the same company. Again, this relationship must be governed by appropriate conflict of interest guidelines (to be developed in Stage 3) to ensure that the reviewer maintains an acceptable degree of independence.

- **Review of Draft Practice Guidelines.** Draft guidelines governing the form of LEP reviews should be the subject of stakeholder consultations convened by the Subcommittee in the course of Stage 3.

8.4 LEP Reviews and New Types of Regulatory Approvals

The Subcommittee does not anticipate a radical departure from the current RPE system feature that expert reviews pertain to applications for regulatory approvals. This form of review was implemented in two recent changes to the Contaminated Sites Regulation (CSR):

- **The CSR amendment of July 1999.** This amendment established an expedited review process for low-to-moderate-risk sites. As a result of this amendment, RPEs may review applications and make recommendations to Ministry for low and moderate risk sites:

    - Approvals in Principle of remediation plans; and

    - Certificates of Compliance for site remediation.

- **The CSR amendment of February 2002.** This amendment extends to RPE function to:

    - determinations of whether a site is contaminated (irrespective of risk posed by the site); and

    - contaminated soil relocation agreements. (See Sections 47, 49 and 49.1 of the Regulation and also Protocol 6, Table 1.)

The Subcommittee recognizes that the Ministry may request LEPs to provide reviews in two additional ways:

- **"No Further Action Letters" (or similar device in Certificates of Compliance).** The Ministry's 2003 discussion paper proposed a "new simple and streamlined risk assessment procedure … to identify sites where substances exist above the numeric standards but do not represent an unacceptable risk due to absence of operable pathways of exposure to receptors[21]." For these sites, the Ministry proposed "to introduce a new regulatory instrument called a No Further Action Letter." (pg. 12) It appears that the Ministry is currently revisiting the need for a distinct instrument or whether the same purpose can be achieved in certificates of compliance. In any case, LEP advice on no further action will require considerably more detailed discussion between the Ministry and the LEP Board to clarify the criteria that should be used in making such recommendations. This clarification is especially required because RPEs are currently not required to give advice on whether the Ministry should issue a no further action letter (or analogous term in a certificate of compliance); in fact, such 'no further action' provision is not yet law. Part of the Ministry/LEP discussion should consider if advice on "no further action" increases LEP liability exposure and, if so, whether it is appropriate to create immunity. (Part 11 reviews liability issues in more detail.)

- **"Summaries of Site Condition".** As discussed in Part 2.4 above, recent amendments to the *Environmental Management Act*, although not yet in force, signal the provincial government's intention to request LEPs to prepare "summaries of site condition". According to the Ministry's 2003 Discussion Paper, these summaries (then called "records of site condition"), will be prepared and registered by licensed environmental professionals and represent the professional opinion of the site status that will be relied upon by the Director (and possibly others) in issuing regulatory instruments (Determination, No Further Action letters, Certificates of Compliance)[22]. The Discussion Paper stated that "Records of site condition will consist of a professional opinion of site status and full supporting technical rationale provided in the form of a summary technical report that lists all technical reports and summarizes key results and conclusions upon which the licensed environmental professional based his/her opinion." As will be the case with providing advice on 'no further action', this advice will also require further discussion to clarify Ministry expectations and to determine whether there will be undue liability exposure. Part 11 below notes that LEPs may be particularly concerned about liability exposure when providing summaries of site condition (as opposed to advice respecting regulatory applications). The Ministry may also need to review, presumably in consultation with the LEP Board, the current requirement under Protocol 6, for site information summaries and soil and groundwater data summaries.

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[21] "A New Contamination Sites Regulatory Process Investigation, Classification and Remediation Process Overview", Ministry of Water, Land and Air Protection, October 22, 2003, at 12.
[22] *Ibid.*

The Ministry Discussion Paper also signals that LEPs might write approvals directly (i.e., not merely advice):

> As the experience and comfort level of stakeholders, licensed professionals and the public with the new regulatory process increases over time, the Ministry anticipates the eventual delegation of the full regulatory process, including issuance of regulatory authorizations, for sites that are not high risk or under risk-based remediation to an independent, self-regulated body of licensed environmental professionals. (page 5)

This potential new role for LEPs departs radically from current practice in Canada (and arguably the US), and creates complex liability and insurability issues, as well as "public confidence" concerns. Needless to say, these new functions will require a substantial analysis of liability exposure and availability of affordable insurance and, indeed, the willingness of LEPs to participate in the system if these requirements are imposed. Significant discussion between Ministry and the LEP Board would be required.

8.5 Recommended Stage 3 Work

Stage 3 work should include development of practice guidelines (in draft form for adoption by the LEP Board) addressing the following key issues:

- when the LEP is permitted to conduct self-assessment (as opposed to arm's length assessment);
- when and how arm's length reviewers may give review-type advice to the owner's consultant at an early stage of the work;
- conflict of interest, particularly where:
    - the owner hires the same company to perform both the site assessment and the LEP review; and
    - the LEP might be seen as a competitor with the owner's consultant.

9.0 'AUDITS'

9.1 The Current System

The RSC and the Ministry have in recent years administered an audit function to review submissions by roster professional experts. This function has included active involvement by the RSC although primary responsibility for conducting audits lies with Ministry (who must ultimately rely on RPE advice when issuing approvals).

The audit process has evolved since 1999. The Ministry summarizes some of the salient features of the current audit process as follows:

> Having conducted their technical and documentary evaluations of the [RPE] submission and reached their own conclusions regarding satisfactory performance of work, the auditors then provide an opinion on the validity of the expert's final conclusions and recommendation.
>
> The auditors then classify the reviewed submission in accordance with the Roster Audit Framework and provide their recommendations regarding any technical or documentary corrective actions needed.
>
> This constitutes the "preliminary findings" of the audit. The auditor's preliminary findings are then provided to the expert under audit for review and comment. After careful consideration of any comment provided by the expert, the preliminary findings may be modified to correct inaccuracies or resolve legitimate differences in professional opinion between the auditors and the expert.
>
> The preliminary findings are then finalized. If the audit discovers errors or deficiencies related to the adequacy of work performed and the site and these errors or deficiencies can be corrected and confirmed, the Ministry will make every effort to authorize issuance of the requested document for the site. Depending on the degree of severity associated with identified errors or deficiencies found, disciplinary actions against the expert in question may be initiated.

Another key feature of the current audit system is that it uses a two-person audit team – normally, one representative each from the Ministry and the RSC. The Ministry is currently amending this feature to use two RSC members, i.e. no Ministry member on the team.

The current audit system also uses an "audit administrator" (a Ministry staff person) to assist in coordinating and administering audits.

9.2 Critique of the Current Audit System

The audit process has been the subject of considerable debate and criticism since its inception in 1999. For example, the Minister's Advisory Panel Report in 2003 identified the following criticisms of the RPE audit function:

- the audit process for Roster decisions is extremely rigorous, even for low risk sites, and requires strict adherence to rigid procedures that do not necessarily produce environmentally sound and economically viable results;

- the audit process creates a strong disincentive for sound professional judgement;

- failure to satisfy the strict requirements for review could have severe and arguably disproportionate consequences for the Roster Expert, including removal from the Roster. As a result, Roster Experts use a highly conservative approach and are very stringent in their requirements for site reviews; and

- Roster Experts do not have an effective means of understanding the expectations. The audit process lacks objectively verifiable criteria for determining whether a Roster Expert's work is acceptable.

These concerns were also evident in the Subcommittee questionnaire responses and in a recent (July 2004) Roundtable meeting organized by the Subcommittee. Participants at the Roundtable meeting, for example, noted that the auditing process can create lengthy and unanticipated delays before issuance of the regulatory instrument and that there is uncertainty over the auditors' concerns. The audit process was also criticized for its perceived lack of transparency, which adds to the perception of the Roster as an "old boys' club."

Given that the audit process has evolved since 1999, it is difficult to assess whether all or some of these criticisms remain valid in light of recent Ministry changes to the audit process. The current Ministry audit process appears to address, at least in a general way, many of the concerns identified in the Panel Report and, at the very least, should serve as a basis for the development of a LEP-specific performance assessment process. The Subcommittee recommends that the Stage 3 work carefully consider the current Ministry audit process to ensure that, if applied by the LEP Board, it would mitigate the expressed concerns over Ministry audits.

9.3 The Ministry's Proposed Changes to the Roster Audit Process

The Ministry recently proposed that the audit system should allow for more face-to-face exchange of views:

> In addition, every Roster expert under audit will be provided an opportunity to meet with their respective auditors prior to the finalization of the auditor's preliminary findings. [Charles Porter letter, June 15, 2004]

The Subcommittee supports this change, particularly the opportunity to exchange views.

The Ministry is also considering longer-term changes to the audit process. These longer term views are as follows:

> It is my opinion that the current Roster Audit Framework and process is overly focused on disciplinary as opposed to educational aspects. Such an audit Framework may well have been appropriate in the early days of the Roster to instil and foster a high degree of public and proponent confidence that "unsatisfactory performance of work" on the part of Roster experts would not be tolerated. However, I do not believe this needs to be paramount today and therefore, it is my intent to replace the current audit process with a Roster Expert Quality Review process designed to emphasize educational improvement as opposed to disciplinary consequences. An essential component of the new quality review process is a greatly enhanced transparency of both process and review findings for the public. I feel strongly that making public the identity of the expert under review combined with full public disclosure of the quality review findings will be as, or perhaps even more, effective in ensuring high quality work than the current audit process. Ideally, the new quality review process would provide a range of disciplinary actions and reserve removal from the Roster, for only those exceptional cases where the work of the expert can be shown to be either grossly negligent or incompetent. In all other cases of unsatisfactory performance of work, educational rather than punitive actions would be the preferred means to deal with the transgression. In addition, the new system should be designed to accommodate a broader range of reviews (eg. both random and "targeted" reviews of experts). [Charles Porter letter, June 15, 2004]

The Subcommittee generally concurs with these views. However, it is concerned "that making public the identity of the expert under review" will create premature publicity respecting the identity of LEP under review and thus adversely affect the member's reputation. As with matters that are under investigation in the professional conduct realm, the mere fact that an expert is being reviewed should not be disclosed. The results – positive or negative – may be matters for disclosure, but not the mere existence of a review.

9.4 The Proposed LEP Performance Assessment System

The salient features of the Subcommittee's proposed performance assessment system (to be detailed in Stage 3) are as follows:

- **Performance Assessment Committee.** A Committee of the LEP Board would have general responsibility for conducting performance assessments. There are various options as to who should conduct the performance assessments. For example, two members of the Board's 'performance assessment' committee could be selected to conduct a specific assessment. Or, two LEP members at large could be appointed for this purpose. On balance, the Subcommittee proposes that the Stage 3 work identify a group of eight to ten LEP practitioners, in consultation with the three parent organizations, to serve as a pool of prospective assessors to be appointed for particular assessments by the Board Subcommittee. In any case, these assessors should be senior practitioners.

- **Coordinator.** There is a need for administrative support and a person with responsibility for achieving consistency from assessment to assessment. (Ministry currently hires an administrator.) This coordinator should also have senior practitioner experience.

- **Frequency of performance assessments to be conducted.** The Subcommittee proposes that:

    - as a general rule, one of every ten LEP reviews (or another ratio, as determined by the Stage 3 work) selected randomly should be the subject of a performance assessment;

    - for every LEP, one of his or her first reviews should automatically be the subject of a performance assessment (eg., one of the first three randomly selected reviews);

    - a mandatory performance assessment of an LEP's review if the LEP's previous performance assessment identified significant problems; and

    - the LEP Performance Assessment Committee should have broad discretion to conduct performance assessments (irrespective of the above-noted assessment triggers). This discretion could be used, for example, to require every LEP to be subject to at least one performance assessment within a 3-year period (irrespective of whether the LEP has ever been selected in the random procedure).

- **Conflict of interest.** Practice guidelines will address possible conflict of interest problems in the relationship of the LEP and the performance assessors. (For example, there may be a conflict of interest issue when the performance assessor comes across information which is sensitive in a litigation or business context.)

- **Exchange of Professional Views.** The performance assessment process (to be developed in Stage 3) should emphasize the importance of collegial exchanges of professional views, even if those views differ significantly. Even the relatively high degree of prescription of the provincial contaminated sites regime (when compared with other jurisdictions) leaves a high degree of uncertainty where professional judgement is necessary. The performance assessment guideline should clearly outline an iterative process providing every reasonable opportunity to allow for expert judgment. As part of this iterative process, the LEP should be given the opportunity to comment on a performance assessment before publication.

- **Contents of a performance assessment.** A performance assessment guideline should comprehensively set out all sources that would be considered in a performance assessment. Such a guideline (to be developed in Stage 3) would specify the CSR, relevant Ministry guidelines and protocols, and LEP practice guidelines. To the greatest extent possible the guidelines should prevent and erase the "moving goal post" perception that has developed under the current audit system.

- **Time limits.** While complex issues might require various exchanges of professional views, it is nonetheless desirable to set, at least on a *prima facie* basis, time lines that can be expected by the owner and the LEP whose performance is being assessed.

- **Publication of performance assessment.** In the interests of developing public confidence, the results of all performance assessments should be published (on the site registry or on a LEP website). These posted results would also serve as a source of guidance for LEPs as they conduct their reviews. The Subcommittee, however, does not favour a system that publishes, prior to the conclusion of the performance assessment, the fact of the assessment. To do so would create, at least in minds of persons who are not familiar with the process, a stigma that is unfair to the LEP whose review is the subject of the performance assessment. To the extent practicable, any publication should not include LEP names. In any case, the matter of identifying LEPs in performance assessments should be considered in the Stage 3 development of the assessment procedure. A related consideration (also for Stage 3) is the need to protect confidential information.

- **Report back to parent organization.** The Subcommittee does not believe that it is necessary in all cases to report deficiencies back to the parent organization of which the LEP is a member. There may be egregious cases, however, which warrant some reporting. Concerns of findings or admissions of significant and serious unprofessional conduct identified in a performance assessment should be forwarded to the applicable parent professional organizations for their information and further action as they deem fit. The work of Stage 3 should prepare guidelines as to when such reporting should take place.

- **Link to LEP Board professional conduct discipline process.** Similarly, this consequence is generally not necessary, except in instances involving apparent serious breaches of professional conduct. While adverse performance assessments will not likely trigger many disciplinary proceedings, it is essential to maintain this link, as it serves to underline the importance of diligent reviews.

- **Communication of performance assessment to Ministry and the Owner.** Given that Ministry will not approve an application for a non-high risk site until a favourable LEP review is received, it is essential the owner and Ministry receive timely notice of the fact that a review has been selected as the subject for a performance assessment.

- **Appeals.** The LEP should be given the right of appeal to dispute an unfavourable performance assessment. This appeal should go to the Coordinator and Chairperson of the Performance Assessment Committee of the LEP Board.

- **Storage and Management of Performance Assessment Documents.** The guidelines should, for example, specify who is responsible for these tasks, whether the documents should be kept by the LEP Board for a certain period, and whether all or some documents become part of the Ministry file for a particular site.

9.5 Performance Assessment Trial Period

Given the central importance of the LEP performance assessment function (LEP reviews will be in demand immediately after the LEP system start-up), it is beneficial to develop and apply performance assessment guidelines before the LEP system is formally established. This experience will serve to assist the LEP Board fine-tune this key function.

Therefore, the Subcommittee recommends that preparation of the guidelines and their application by the current audit team (one Ministry, one RSC member) take place at least for the two-month period prior to start-up.

9.6 Recommended Stage 3 Work

As tools for the Board, we recommend preparation of the following:

- a draft performance assessment process, generally using the Ministry audit process described in Part 9.1 as a starting point and further incorporating the features of Part 9.4;

- a guideline addressing potential conflict of interest between the performance assessor and the LEP; and

- a protocol addressing under which condition a negative performance assessment could lead to a report back to the parent organization or a link to the discipline process.

The Subcommittee further recommends that, given the central importance of performance assessments in the LEP system, Stage 3 work should allow for public review of the draft performance assessment process. This review is especially important because the acceptable degree of scrutiny applicable in a performance assessment is a subjective matter – the review will assist the Subcommittee strike an optimal balance.

10.0 PUBLIC COMPLAINTS

10.1 General

LEP systems in other jurisdictions typically allow for a complaint process and a professional conduct or 'discipline' process for dealing with those complaints that have substance. This process reflects a policy that an effective complaints process is necessary for ensuring public confidence in increased LEP reliance. The Subcommittee has concluded that a complaints process which includes external, or 'public', complaints is an essential part of any independent LEP system, especially given the environmental and/or property risk associated with contaminated sites.

The Subcommittee also recognizes that members of the public may, at least initially, contact the Ministry with a complaint about an LEP. The Subcommittee proposes that the LEP Board should, through established procedure, have primary responsibilities for reviewing public complaints about LEP member conduct and imposing sanctions if necessary. Accordingly, the Ministry should refer public complaints to the LEP public complaints procedure.

It is important to distinguish complaints processes, performance assessments and formal disciplinary proceedings. Complaints focus on particular allegations, generally by third parties or by members of the public, and thus have limited scope. That is, the investigation should be directed at the specific conduct complained about, not at the member's overall practice or handling of a particular project. In contrast, a performance assessment will typically be broader in scope and include the member's practice methodology used to provide the review. Moreover, a performance assessment is triggered not by a complaint but by the mechanism established by the Board (see Part 9.4), whether random, targeted or practice-based. A weak or 'failing' performance assessment could form the subject of a complaint, which would then proceed through the usual process for dealing with complaints. Such a complaint would simply be an internally-generated complaint as opposed to a 'public' complaint. As for a disciplinary proceeding, the Board should retain broad discretion for determining whether a disciplinary hearing or other resolution is warranted.

There is very direct linkage, however, between the complaints and professional conduct processes. As in the case of performance assessments (discussed in Part 9.5 above), the investigation of a complaint could reveal serious breaches that warrant further disciplinary consideration. If the apparent breach is significant enough (eg., it passes the referral test prescribed in the complaints procedure), the LEP's conduct could be the subject of both the complaints process and the professional conduct (disciplinary) process. Care should be taken, however, to ensure that the complaint investigation does not permit 'fishing expeditions' for sources of professional conduct complaints.

10.2 Background

It is expected that the vast majority of LEPs will already be registered within a self-governing entity (APEGBC, BCIA or CAB) that imposes ethical and competency standards. These professional conduct requirements, as much as a self-governing organization's entrance standards, are the foundation for ensuring that the public interest is protected. Maintaining public confidence via appropriate quality assurance processes is no less important for the proposed 'hybrid' LEP system. Most members of the public will not differentiate LEPs' professional obligations from those of other, more established or independent professions.

LEPs will be expected to comport themselves within the professional conduct bounds of their respective 'parent' organizations even when acting in their capacity as an LEP. Because LEP status may in part be granted by virtue of a professional's membership in one of these organizations, most LEPs will not be able to 'remove the hat' that allowed entry into the LEP profession. Therefore, one key conceptual issue is ensuring that the complaint, discipline and performance assessment standards and processes established specifically for LEPs are harmonized as much as possible with those of the LEPs' other professional organizations. That is, the new LEP conduct standards and processes should reflect the central tenets under which the professional members already practise.

However, the LEP model will require its own specific complaint, professional conduct and performance assessment measures. This is particularly crucial if some LEPs are not already members of a self-governing profession. A complaint process that simply referred an aggrieved member of the public to an LEP's parent organization is unlikely to satisfy the government's requirements for transparency and public interest. Such referral would also require parent organizations to amend or pass bylaws, rules or policies specific to their members' conduct as LEPs – this could prove to be a complex and unnecessary burden in light of the preference for establishing a stand-alone 'hybrid' system.

The Subcommittee recognizes that the LEP system will be comprised of a relatively small membership when compared with self-governing professions such as engineering, law and medicine, and that budgetary constraints for administration of the system will be a concern. The LEP body may receive a small number of complaints, but the integrity of LEPs, including public confidence, cannot be maintained without ensuring that a suitable complaint and disciplinary structure is in place.

10.3 Complaints and Complaint Resolution

As noted above, other LEP jurisdictions include a complaint mechanism, and such a process will have to be established for a semi-independent profession through *Society Act* registration. While no two professional regulatory bodies' complaint and investigation

processes are alike, there are several consistently applied principles in Canada. They include:

- conceptual separation of the complaints procedure, the formal discipline procedure, and the performance assessment process;
- establishing a complaint intake, notification and response policy;
- establishing an investigation process and policies;
- establishing a standard for referral of complaints to a higher 'disciplinary' plane; and
- the use of an alternative dispute resolution process to resolve complaints.

10.4 Separation of Complaints Procedure from Discipline Procedure

While the terms "complaints", "professional conduct" and "discipline" are routinely conflated and are certainly related, it is vital that distinctive processes be established and clearly articulated within the LEP model. A "complaint" initiates an investigation into a member's professional conduct. If that investigation results in a determination or recommendation that a member be charged (or, in more current language, that an allegation of unprofessional conduct be made), the member proceeds to the "professional conduct" or "discipline" stage. Note that the term "unprofessional conduct" can imply not only ethical lapses, but incompetence and incapacity concerns as well.

Canadian courts have determined that different standards of procedural fairness apply to the complaint/investigation stage and discipline stage. In short, a member is entitled to a broader spectrum of protection and transparency at the disciplinary stage where he or she faces the prospect of sanction, including loss of right to practice. These protections, known as "procedural fairness", are routinely scrutinized by our courts and are thus relatively standardized across the self-regulated professions. In the complaint and investigation stages, however, the self-governing body has wider latitude to set its own course, including establishing its own unique rules about how to receive and handle complaints. This is equally true of occupational/professional societies in the province; the *Society Act* specifically requires bylaws relating to conduct of members, ethics, suspension, expulsion or other penalties for misconduct, incapacity or incompetence of members.

The importance of establishing distinctive complaint/investigation and discipline responsibilities has been recognized by our courts as vital within a self-governing context. In 1989, the Saskatchewan Court of Appeal addressed the issue in a case involving charges against a physician:

> ...[T]he division of functions as outlined above is necessary to preserve fairness in a situation where the [self-governing body],

> through its agents, committees and governing bodies, in disciplinary matters that can have grave consequences to its members, acts in various stages as investigator, prosecutor and adjudicator – in more common terms, it acts as policeman, prosecutor, judge, jury and executioner. The separation of functions ensures that at least two or three different bodies must review the case. It guards against the possibility that knowledge acquired or biases induced by one stage of the proceedings will ... improperly influence a later stage of the proceedings. Furthermore, investigation and adjudication often require quite different approaches. Finally, there are procedural safeguards built into each step of the disciplinary process, and action outside of that process would deprive the doctor under investigation of those safeguards.[23]

10.5 Establishing a Complaint Intake, Notification and Response Policy

Some organizations require, by statute, that a complaint against a member meet certain objective criteria. The most common are that the complaint be in writing and be signed by the complainant. Other procedural matters include rules or policies for notifying members that a complaint has been made against them and rules requiring a written response within a set time period. Similarly, some complaint processes set a reasonable time limit for lodging a complaint after the alleged misconduct has taken place. If time limits are adopted, the LEP system could still retain the discretion to proceed with 'stale' complaints where appropriate.

The LEP complaints process should address issues such as whether to accept anonymous complaints in certain cases (such as where identifying the complainant would cause harm or undue prejudice to that party) and whether to proceed with a complaint in situations where legal action is also underway for the same alleged misconduct. The LEP system will have leeway in setting policy in these areas. In general, as long as a self-governing profession (including a society) has put its mind to these issues and has determined a reasonable policy, courts and government are unlikely to take issue with the process.

In the development of the LEP model, one key consideration was whether Ministry or the LEP Board should handle complaints and investigations. While the survey results showed a preference for neutral or shared responsibility, this is one area where a clear demarcation of responsibilities is imperative. Further, assuming that the society model is chosen as the legal foundation for the LEP system, the bylaws will have to describe the complaints/investigation process and identify responsibility. The society will itself have to take this responsibility as part of its statutory obligations; it cannot be delegated to another entity such as Ministry, although the Ministry will have input as bylaws are drafted and assuming there is Ministry representation on the governing Board.

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[23] *Stephen* v. *College of Physicians and Surgeons of Saskatchewan* (1989), 61 D.L.R. (4th) 496 at 500-501.

An intake body or individual must be identified and charged with the responsibility of communicating with the public about the LEP complaint process and handling the intake of complaints made against LEPs. Because the "disciplinary" stage of resolving complaints is conceptually and legally distinctive from the intake and investigation stage and requires that a qualified independent person or panel hear the case, it is not suitable for the LEP Board to itself handle complaint intake.

Finally, the process is often referred to as a "public complaints" process. While to some this may suggest that the ability to lay a complaint is limited to a layperson or party other than those interested parties in a particular contaminated site context, a "public complaints" process must allow any individual or entity to lodge a complaint against a professional. This would include a complaint lodged by a fellow LEP, a client, environmental organization or government official.[24] It is unrealistic to generally rely upon 'consumers' or members of the public who have no direct involvement at a contaminated site to detect ethical breaches. Self-governing professions, including those established by society registration, are expected to be proactive in enforcing practice standards, which requires that any complaint process allow practitioner-initiated complaints and practice reviews or audits.

Because professional bodies' complaint processes are sometimes used for frivolous ends or as an inappropriate tactic to leverage negotiations or legal disputes, discretion must be given at the investigation stage to dismiss those complaints that are plainly ill founded. This latitude is discussed further below.

The Subcommittee recommends that a plain-language complaint intake, notification and response policy be drafted for the LEP system and made easily available to the public. Consideration should be given to requiring written and signed complaints that clearly identify what conduct is alleged to have been unprofessional and that such complaints be submitted within a specified time period. The process will have to be described, at least generally, in the bylaws if the *Society Act* model is chosen. An individual or committee separate from the LEP Board should be identified as the complaints intake officer (or similar title).

10.6 Establishing an Investigation Process and Policies

After a complaint is received and deemed to comply with the LEP system's requirements, an investigation must ensue. From the government and public perspective, a reasonably thorough investigation ensures that a legitimate complaint is properly handled so that any competency or ethical shortcomings are addressed. As a member against whom a complaint has been made, a proper investigation helps ensure that unwarranted or unfair complaints are filtered out.

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[24] In addition, the LEP performance assessment process could trigger a complaint, which would have to be investigated and handled in the usual fashion.

As noted above, this stage of the process allows the self-governing body considerable latitude to design its own process. Some smaller self-governing bodies conjoin the complaints intake and investigation responsibilities within a single position, such as a 'Complaints and Investigation Officer'. Other professions establish stand-alone 'Investigations Committees' or 'Preliminary Inquiry Committees'. For the sake of brevity and clarity, the person or committee charged with investigations will be called the "Investigator" in this section.

Once the complaint has been sent to the member and a response received, the Investigator proceeds by gathering relevant information, interviewing parties, etc. An Investigation Report or recommendation is then often prepared and sent to another entity such as a Disciplinary Committee or the governing council or board. That body may then authorize the laying of charges or allegations and proceed with a formal disciplinary inquiry or hearing. In some cases, self-governing professions designate separate disciplinary committees to deal with ethics issues or with practice competency allegations.

The LEP system will require establishment of a proper investigation process. To ensure legal separation of functions, this Investigator will have to function separately from the LEP Board if the Board is being considered as the source for the actual Disciplinary Committee(s) that will review cases that have moved through intake and investigation. The Investigator should be vested with sufficient investigate powers (such as placing an obligation on LEPs to co-operate in an investigation and allowing the Investigator to inspect and copy documents) to permit a suitably thorough investigation to occur. These powers and obligations can be granted via the bylaws and supporting procedures documents passed by the Board.

In summary, the Subcommittee recommends that an Investigator (whether an individual, team or committee) be appointed and supported by suitable investigation policies or rules to allow latitude in assessing complaints and making recommendations. LEPs should be required to co-operate fully with an investigation. If the LEP Board (or Panel drawn from the Board) is to act as a Disciplinary Committee, the LEP Board should not handle complaint intake and investigation.

10.7 Establishing Standard for Referral of Complaints to the Professional Conduct or 'Disciplinary' Stage

One of the Investigator's most difficult tasks is determining, at the end of an investigation, whether the evidence and information gathered is sufficient to recommend that an allegation of unprofessional conduct be made. In some investigation models, the Investigator does not make such a recommendation, but passes the investigation report to another person or body, such as a Disciplinary Committee, which decides whether the information in the report points to the need for a disciplinary hearing.

The challenge of assessing whether to move a complaint to the discipline stage is especially daunting when the complaint relates to a competency issue in a technical or

scientific context such as within an LEP's role. The decision whether to dismiss a complaint or 'move it up the ladder' carries considerable consequence. If a complaint is dismissed and no complainant appeal mechanism is in place, the matter ends. Few professional organizations provide an appeal from a decision to dismiss a complaint, leaving a disgruntled complainant with the costly option of pursuing a 'judicial review'. (The LEP model may not be well-suited to establishing a complainant's appeal process. The size of membership, staff costs and the expected number of complainants may not justify such a mechanism.)

If a complaint is moved to the disciplinary stage, it is generally seen to conclusion through a formal disciplinary hearing or by some consent order or negotiated process that requires that the member facing the charges make an admission of unprofessional conduct. In either case, the member endures the stress and cost of defending a professional conduct charge, and even a finding at a hearing that the member did not act unprofessionally may take a disproportionate toll on the member and the organization.

The LEP system's professional conduct rules, policies or guidelines should provide the Investigator (or other decision-maker) with clear direction as to when a complaint should be dismissed or elevated. A clear definition of competency standards and of unprofessional conduct on the part of an LEP will prove invaluable to the LEP investigation and discipline process. It also provides potential complaints, all LEPs and government with greater certainty as to whether certain conduct is 'off-side' and should help avoid unnecessary or ill-founded complaints.

The Investigator should also be well-versed in related legal and environmental matters such as the jurisdiction of the Environmental Appeal Board. In some cases, complaints may be brought against an LEP that should properly be put before another body such as the EAB. The Investigator should be able to direct complainants to the suitable agency or tribunal as appropriate.

The Subcommittee recommends that clear language defining the ethical and competency standards for LEPs be articulated for the benefit of the Investigator, public and LEPs generally. The Investigator should prepare a report summarizing the complaint and investigation results. The LEP Board will want to consider whether the investigator should include a recommendation in this report.

10.8 Dispute Resolution of Complaints

Most self-governing professions employ some form of alternative dispute resolution in an effort to resolve complaints without resort to disciplinary hearings or full investigation. There are several options available for adopting a mediation or related process within the proposed LEP system. The most common model functions by having a representative of the self-governing body or an appointed mediator meet with the complainant and practitioner in an attempt to resolve the complaint without further investigation. Some complaints can be resolved privately and without resort to further involvement by the profession except to report to the self-governing body as to the terms of any agreement.

However, the requirement that all self-governing professions protect and advance the public interest means that any mediation process under consideration by the LEP system must be limited in jurisdiction. For example, while a fee dispute between client and LEP may be well-suited to mediation (and may have no true ethical or competency element that would bring it within the LEP Board's jurisdiction in any event), such process would not be appropriate where the alleged conduct raises concerns about safety or other public interest issues.

The LEP system will also have to consider the cost consequences of adopting a mediation process, particularly if external mediators are hired. A simple 'mediation referral' service, in which complainant and respondent share the cost of any mediation they mutually agree upon, may be the most practical option.

Mediation between complainant and respondent on issues strictly between them should also not be confused with other alternative dispute resolution methods of resolving complaints without moving them to a disciplinary hearing. Many organizations have implemented a consent order or consensual resolution process that is offered after an investigation has been completed and the recommendation has been made to proceed to a disciplinary hearing. A practitioner who wishes to make an admission of unprofessional conduct in exchange for a reduced sanction or to avoid the cost, stress and uncertainty of a disciplinary hearing will generally attempt to resolve the complaint in this way.

This form of alternative dispute resolution may employ mediation as a means of reaching an agreement, but such agreement is a form of disciplinary order, not a private matter between complainant and professional as discussed above. One of the key advantages to including a formal complaint resolution process is the opportunity for all sides to reduce the legal and related costs of proceeding directly to a disciplinary hearing.

The Subcommittee believes that the LEP system considers, at minimum, including a form of complaint resolution for matters that have moved through investigation and are directed towards formal disciplinary hearing.

10.9 Discipline Procedure: Hearings, Sanctions, Appeals and Relationship with Parent Organizations

Once a complaint has been investigated and a decision made that there are sufficient grounds for it to proceed to hearing (or the matter has not been resolved by some form of alternative resolution), the LEP system will require a formal hearing or 'inquiry' process. The key general issues in establishing a hearing process include:

- ensuring standards of procedural fairness are met;
- setting the composition of Disciplinary Panel or Hearing Committee;
- establishing rules and evidentiary procedure for the hearing, including the role of 'prosecutor' and 'complainant' in the process;

- establishing a fair spectrum of sanctions;
- considering an appeal mechanism; and
- formalizing disciplinary reporting between the LEP system and parent organizations.

10.10 Hearings and Procedural Fairness

As noted in Section 10.4, Canadian law requires that professions with the ability to sanction or expel their members must ensure that standards of procedural fairness are in place and are followed in any disciplinary hearing.

General principles of procedural fairness (sometimes referred to as "natural justice") include the right to be informed of the complaint, the right to counsel, the right to respond to the allegations and the right to have the allegations judged by an unbiased decision-maker. Other fairness rules are somewhat more flexible and include whether a member has a right to an oral hearing (as opposed to the parties submitting written argument) and the extent of the member's right to review documentation gathered during the investigation.

The LEP disciplinary hearing system will have to comply with the fundamentals of procedural fairness or risk having decisions overturned upon appeal or judicial review. While it is not strictly necessary to detail every aspect of procedure for holding hearings in bylaws, it will be useful for the LEP Board to adopt a working document for holding hearings. It is also strongly recommended that the society publicly acknowledge its obligations to administrative justice by making a statement in its bylaws that disciplinary hearings will accord with principles of procedural fairness.

10.11 Composition of Disciplinary Panel

Many self-governing professions empanel a group of three or more members of the governing Board or Council to sit as a Disciplinary Panel/Committee. Others establish a separate Committee, often comprised of experienced practitioners and lay members.
Given the relatively small membership of the proposed LEP system and the expectation that complaints and disciplinary hearings will be relatively rare, it would appear most efficient to use the LEP Board to create Disciplinary Panels on an as-needed basis. The Board will want to ensure that the composition varies from hearing to hearing and that the Panel is at least broadly representative of the Board's general composition. For example, a three-member Disciplinary Panel should include at least one non-LEP Board member. This 'lay' member ratio is often adopted in other self-governing professions' disciplinary hearings and reflects concern for ensuring public representation. It is another

example of the LEP *Society Act* model attempting to mirror, wherever possible, the true self-governing professions' structure.

Further, the Board may want to ensure that at least one of the LEP members is also a member of the same parent organization as the member facing allegations of unprofessional conduct (recognizing that some LEP society members may not be members of any of the three parent bodies).

10.12 Hearing Rules and Procedures

In general, self-governing professions establish their own general rules of evidence and procedure, always mindful of the overarching principles of procedural fairness and the possibility of a flawed process inviting judicial review. These rules tend to be much less formal and complex than evidentiary rules of court. Nevertheless, the rules and procedures are detailed and should be developed in collaboration with legal counsel. They include delineation of the role of 'prosecutor' in the hearing, which is often external counsel, whether the complainant has a role other than as a potential witness, the admissibility of evidence, number of witnesses, rules for cross-examination, whether a transcript of the hearing is taken, etc.
Assuming a society registration is the chosen legal entity for the LEP system, it is likely sufficient to make a general commitment in the bylaws to the establishment of a disciplinary hearing that will be governed by the rules and procedures established by the Board. The Board can refine and pass these rules in the normal course of its policy and procedures after their development at Stage 3.

10.13 Sanctions or Penalties

The *Society Act* specifically requires that a group seeking occupational title protection include in its bylaws provisions respecting penalties for misconduct. This does not mean that specific penalties must be set out for specific infractions, such as specifying that a six-month suspension applies to any LEP found guilty of misrepresentation, etc. However, the bylaws should address the Disciplinary Panel's ability to assess the full range of administrative law sanctions, and a 'Sanctions Guidelines' document might be useful for a Disciplinary Panel for approval by the Board once established.
Such guidelines would be advisory only. The document could outline the spectrum of sanctions available, from reprimand through fines through suspension and expulsion, and identify general criteria for 'sentencing', as the process is sometimes described. In the end, the body deciding whether unprofessional conduct has taken place must have flexibility to assess a sanction that fits all the circumstances of the case before it.

One of the most contentious penalties in professional self-regulation, albeit one of the most common, is the publication of the results of a finding of unprofessional conduct. Almost all self-governing bodies publish the results of disciplinary hearings or consent

orders, and the LEP system would be well served to follow this important public interest and deterrence measure. However, publication procedures should be identified in bylaws or supporting rules and procedures to ensure members are aware of this measure. These and other details can be addressed in Stage 3 as needed.

10.14 Appeals

Stand-alone legislation for many self-governing professions establishes an appeal mechanism from decisions by a Disciplinary Panel. Other professions without this statutory appeal have established their own appeal process.
While it may appear burdensome in light of the size of the LEP membership and expected volume of complaints, an appeal process should be established. Otherwise, a member 'convicted' of unprofessional conduct is left with little choice but to bring a costly and time-consuming judicial review in B.C. Supreme Court should the member continue to believe his or her conduct was not unprofessional.

A simple, streamlined appeal system could be established to avoid undue delay and cost to all parties. Any appeal process should include a deadline for filing intention to appeal, establishment of an independent person or body to hear the appeal and other procedural details.

10.15 Reporting Findings of Unprofessional Conduct to Parent Organizations

The importance of properly aligning the LEP system's professional conduct process with that of the three parent organizations was described in Section 10.2. This includes ensuring that conduct and professional standards are closely tied and establishing a mechanism to communicate conduct concerns between bodies.
The filing of a complaint and the status of an investigation – even the content of any discussions for alternative resolution of complaints – should be confidential. No reporting of the mere existence of a complaint, investigation or consensual resolution discussion should be made beyond the LEP complaint process. However, the Subcommittee believes that any finding or admission of unprofessional conduct must be reported to the LEP member's parent organization. That organization may then handle the matter according to its own policies and considerations, including deciding whether separate allegations should be made against the member, etc.

10.16 Recommended Stage 3 Work

In order to establish the foundation for viable public complaints and professional conduct processes, the Subcommittee recommends the following tasks be completed at Stage 3:

- drafting of a plain-language complaint intake, notification and response policy, with consideration given to describing the entire process in the society's draft bylaws;
- drafting of a suitable complaint investigation process with consideration given to describing the process in the draft bylaws;
- drafting of a guideline document for the society's 'Investigator' regarding assessment of whether a complaint should proceed or be dismissed, including a template for the 'Investigator's Report';
- ensuring that comprehensive ethical and competency standards are articulated in the society's practice standards documentation;
- including an alternative complaint resolution process, such as consent order, mediation or consensual resolution, within the broader conduct framework, with consideration given to including this process in draft bylaws;
- drafting suitable language for inclusion in draft bylaws regarding the composition and conduct of disciplinary hearings;
- drafting practical guidelines for the Board for holding disciplinary hearings;
- drafting language for inclusion in bylaws regarding the range of sanctions available to the society and preparation of a sanctions guideline document for the benefit of the Board (including the contentious issue of publication of disciplinary matters);
- establishment in the bylaws of a suitable appeal process; and
- preparation of policy or bylaw regarding reporting from the LEP society to parent organization of conduct matters.

11.0 LIABILITY OF LEPs

11.1 The Need to Revisit Liability Exposure

Exposure to liability may be the single most important factor in determining LEP willingness to meet the demand from property owners for pre-approval reviews. Liability exposure is also a potential concern for directors, officers and employees of a LEP Board. In short, the LEP system could be fatally flawed if LEPs fear that their reviews or participation on a LEP Board will attract undue liability exposure. Accordingly, the Subcommittee paid particular attention to how liability issues might constrain the willingness and ability of LEPs to provide review services.

Liability exposure of RPEs (who perform essentially the same tasks contemplated for LEPs, at least initially) was the subject of a legal opinion prepared for APEGBC by Bull Housser and Tupper. That opinion identified a significant degree of liability exposure: see opinion by Bull, Houser and Tupper at http://www.apeg.bc.ca/aboutus/cs/documents/CSRSC-Report-BHT.pdf. The APEGBC opinion generally concluded that private sector advisors to government can be exposed to liability if their negligent acts cause harm to other parties, such as site owners, neighbouring property owners, municipalities, regional districts, former and subsequent purchasers of the site and lenders.[25] Although the APEGBC opinion did not specifically address LEPs (as it was written prior to development of the LEP system), the Subcommittee is concerned that the liability exposure problems identified in that legal opinion could apply to LEPs.

Given the lack of statutory immunity for LEPs (and unwillingness by the Province to extend this immunity to LEPs), the Subcommittee considered whether other forms of liability protection could ensure a reasonable degree of protection and whether the RSC and, subsequently, the LEP Board could take steps to reduce liability exposure concerns. The Subcommittee therefore proposes the following approach for reducing liability exposure. Before start-up (during Stage 3), the Subcommittee proposes that the RSC take the following steps:

- to inform its discussion with the Ministry, the RSC should prepare a more detailed legal opinion than was prepared for APEGBC, covering the LEP liability issues (including those summarized in Part 11.2); and

- on the basis of its legal opinion, the RSC should then enter discussions with the Ministry to implement liability protection measures (including consideration of the measures discussed in Part 11.3).

For the immediate period after start-up, the Subcommittee proposes that the new LEP Board should as a high priority:

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[25] This is in addition to any claims arising from contract (eg., contracting landowner against the LEP for breach of terms, etc.). Under the Environmental Protection Act, government employees are essentially immune from claims that may arise as long as they have acted in good faith in the course of their employment.

- analyze the extent to which the liability issues described in Part 11.2 are evident in day-to-day LEP practice;
- consider if and how an omnibus insurance requirement could be imposed (including, as noted in Part 6.5 above, discussions with insurers);
- monitor the effectiveness of the insurance disclosure requirement (including whether mere disclosure provides enough comfort to persons who retain LEPs);
- review whether the measures discussed in Part 11.3, if implemented, could reduce liability exposure to a reasonable degree; and
- enter discussions with the Ministry to determine if, short of broad statutory immunity, certain discrete forms of immunity can be provided to LEPs, especially if insurance coverage is not possible. For example, the Province could indemnify an LEP in the event that he or she must attend as a witness in an Environmental Appeal Board or other matters on behalf of the Ministry.

11.2 Summary of Liability Issues

LEP liability exposure could arise primarily in three instances:

- when serving as directors, officers or employees of a LEP organization;
- when negligently conducting reviews, i.e. recommendations to Ministry respecting the issuance of regulatory instruments; and
- when negligently providing "summaries of site condition".

Parts 11.2.1 to 11.2.3 below briefly describe these types of liability (and should not be construed to be a legal opinion). In addition, the Subcommittee recognizes that the Ministry may eventually request that LEPs sign approvals directly – these sign-offs could also create liability exposure.

11.2.1 Director, Officer and Employee Liability

It is reasonable to expect prospective LEP Board directors, officers and employees to question whether the society or legislative body can provide liability insurance or some other form of protection to protect against personal liability for the organization's debts and other forms of liability. Liability concerns may prove a strong disincentive to prospective LEP Board members, committee members and others from coming forward and contributing their time and expertise to the proposed system. Some statutory-based

professional bodies have even had difficulty renewing generic directors' and officers' liability policies. Organizations with a 'captive insurer' model in place have weathered the insurance crunch in better shape than those professions looking to the commercial insurance market for coverage. The Subcommittee recommends further review of director liability and available insurance options in Stage 3.

11.2.2 Liability for LEP Reviews Respecting Regulatory Applications

LEP reviews in the proposed Framework are prepared for the client for the limited purpose of seeking regulatory approval. Without suitably express language in the LEP review to the Ministry, it may be unclear whether the review is intended for use by parties other than the Ministry and the LEP's client. This concern already arises in the current RPE system, where Ministry instruments expressly tie the RPE member to the approval. The RPE recommendation letter is also cited in the instruments themselves. These references may create an inference that, although the decision-maker is the Ministry, any actionable errors or omissions are those of the LEP.

A basic principle of negligence law is that the plaintiff must prove that reliance on the professional advice caused the damage and that such damage was foreseeable by the advisor. Nonetheless, it is arguable that because LEP review is a precondition for Ministry approval, third parties who rely on the regulatory instruments might be construed to have (indirectly) relied upon the LEP advice. In this case, indirect reliance by third and/or subsequent parties is reasonably foreseeable, if not to be expected. Case law is unclear as to what constitutes foreseeability of *indirect* reliance by a third-party plaintiff in this context. While the LEP review may be focused – ostensibly written for the owner for the sole reason of Ministry approval – it is not difficult to imagine situations where transactions are premised on LEP advice, thus drawing in more actors than merely the LEP client and Ministry.

11.2.3 Liability for LEP Preparation of Summaries of Site Condition

As noted in Part 2.4, the new Act introduces the concept of the Summary of Site Condition ("SSC"). The Act assumes that "approved professionals" (i.e., LEPs) will prepare a SSC. And, as discussed in Part 8.4, the Ministry assumes that LEPs will enter SSCs onto the Site Registry. The preparation and entry of SSCs onto the Site Registry will likely be the subject of consultations between the Ministry and the new LEP Board. A prominent issue in these consultations will likely be LEP liability. When compared with LEP reviews respecting applications for approvals, LEP compilation of SSCs arguably creates more liability exposure. This increased exposure arises because the intention of the Ministry Site Registry is to allow the public to rely on this information. It is especially problematic if the Ministry does not vet, or 'adopt', the information.

Plaintiffs may more readily argue that they are entitled to rely on this publicly available information especially as it has no stated limited focus.

11.3 Possible Protective Measures

It appears from Part 11.2's summary of liability issues that a possible prominent concern of the courts might be over the intention of the LEP review: which other parties (aside from the Ministry and the LEP client) can rely on the LEP review? Does the LEP have a duty of care to these other parties?
Another prominent concern pertains to the applicable standard of care. A common concern of RPEs has been that it is difficult to discern the standard of care, and this concern could extend to LEPs without practice guidelines.

Given these two prominent concerns – over foreseeability and standard of care – the Subcommittee proposes that the following measures be considered as means for reducing liability exposure:

- practice guidelines have the potential of providing considerably more guidance for practitioners than is now the case under the RPE system;

- the performance assessment process, the public complaints procedure and the professional conduct procedure will, over time, help reduce the overall liability exposure of members through education, mentoring and deterrence;

- insurance disclosure and acknowledgment (if governed by practice guidelines described in Part 6.4) will give clients a clear understanding that the LEP might not be insured, or, if insurance applies, the extent of that coverage. As discussed in Part 6.4, it is not realistic to assume that all LEPs, as of April 1, 2006, will be able to obtain the necessary level of insurance now required by the Director in the RPE system ($2 million);

- express statements or disclaimers in the LEP advice to Ministry could state that LEP advice is just that – advice – and it pertains only to the Ministry and the client. This disclaimer would assist the defendant LEP to argue that the advice was not intended to be used by another party who sought to rely on the advice. The Subcommittee proposes that the Stage 3 work (or the LEP Board after start-up) seek such wording;

- a reference or disclaimer in site registry legislation that any entry onto the registry by an LEP (eg., a summary of site condition) could expressly warn that reliance on the registry provides no basis for damages by a member of the public who reads and relies upon the LEP entry. This reference or disclaimer should be sought in the course of the Stage 3 work (or by the Board on its own initiative after start-up); and

- issuance of regulatory approvals such as Certificates of Compliance by the Ministry should not refer to any reliance by the Ministry on LEP advice. That is, Ministry should clearly state that it has reached its own independent view, although in practice the LEP review has been a primary source of information. Again, this should be pursued in Stage 3 or by the LEP Board.

It is premature to determine whether these means, individually or collectively, will provide LEPs with a reasonable degree of comfort. As proposed in Part 11.1, there will likely be a need to empirically determine if a liability chill exists.

Absent an appropriate combination of liability protections, the Subcommittee is concerned that only two types of LEPs may come forward to provide services:

- those in large companies or firms that have adequate internal or other means of insurance; and

parties who do not have insurance and, although they disclose this fact to clients, take the view that they will 'roll the dice'. This latter mischief is difficult to overcome, but it certainly can be mitigated and largely prevented if the field is opened up to more types of LEPs, including those firms and companies whose LEPs might not have the full capacity that larger companies have for self-insurance or some other forms of financial guarantees in the event of errors.

11.4 Recommended Stage 3 Work

During Stage 3, the RSC should take the following steps:

- to inform the discussion with the Ministry, the RSC should obtain a more detailed legal opinion than was prepared for APEGBC, covering LEP liability issues that might arise in different scenarios (including those noted in Part 11.2); and

- on the basis of its legal opinion, the RSC should enter discussions with the Ministry to implement liability protection measures (including consideration of the measures discussed in Part 11.3).

12.0 OTHER PRACTICE GUIDELINES

12.1 The Current Gap

In the current Roster system, guidance for Professional Experts is provided in legislation, Ministry guidance documents, protocols, and also through the three parent organizations. While this represents a large body of guidance on many substantive issues, a common criticism of the existing RPE system is the lack of supplementary "practice guidelines". That is, while the Contaminated Sites Regulation and Ministry guidance documents focus on what must be reviewed, there is a far less guidance on how the review can take place, including if and how professional judgment can be applied to certain complex problems.

Parts 7 to 9 identify many instances where practice guidelines could clarify how LEPs should prepare their reviews. Part 9 discusses the syndrome of RPEs, in the absence of practice guidelines, being driven to apply overly-rigid and highly conservative reviews for fear of unfavourable audits and liability exposure. Practice guidelines, as discussed in Parts 7 to 9, are not prescriptive codes; rather, practice guidelines serve to establish the parameters within which professional judgement can be exercised.

Practice guidelines are an important feature of LEP systems in other jurisdictions, and should therefore be considered as possible precedents. The Subcommittee's 'Considerations' Report (discussed in Part 2.2 above) noted the relevance especially of US jurisdictions (eg. the Environmental Protection Agency, Massachusetts, Connecticut, California).

Aside from being issue-specific, practice guidelines could address general issues such as ethics. Similarly, practice guidelines could set out, at least in broad terms, the general standard of care applicable to LEPs (quite apart from specific guidance set out in Parts 7 to 9) and LEP/client relations. To illustrate, US jurisdictions such as Massachusetts have developed practice guidelines for circumstances where a client fires the LEP – practice guidelines recognize that clients may on occasion attempt to fire a LEP in order to cover up the existence of contaminants on the site or believe that he or she can obtain a more favourable opinion from another LEP, and provide guidance to the 'fired' LEP and the new LEP (including the extent of disclosure required by the fired LEP).

12.2 Recommendations for Stage 3 Work

The Subcommittee recommends the preparation of the following practice guidelines (in addition to those identified in Parts 3 to 10):

- ethics;
- general standard of care; and
- LEP/client relations.

The Subcommittee also recommends, further to Part 12.1, that all LEP practice guidelines be prepared to achieve, to the extent practicable, consistency with the guidelines found in the parent organizations.

13.0 FINANCIAL MATTERS

13.1 Determining Demand for LEP Reviews

Demand for LEP reviews has direct implications for the budget of an LEP Board. For example, a high number of LEP reviews could trigger a proportionately high number of Board performance assessments. Therefore, a starting point for determining the scope of the LEP system and its associated revenues and costs is an estimate of the number of contaminated sites that may be the subject of LEP reviews.

Projecting the number of sites undergoing investigation or remediation (and related demand for LEP reviews) is difficult for several reasons. For instance, the real estate and development market largely governs the rate at which sites are remediated (the other factors being cost recovery litigation and, to a lesser degree, government orders). Moreover, the triggers for drawing sites into the process and for classifying sites as high risk or not high risk and therefore requiring LEP involvement are currently being reviewed by the Ministry – as these triggers change (as discussed in Part 8.4) and as non-high risk classification is defined, so will the demand for involvement of LEPs. A third source of uncertainty is whether the LEP system will encourage owners to seek reviews for the purposes of seeking regulatory confirmation (not all investigations and remediation today are reviewed, particularly if the site owner does not seek regulatory approval).

In spite of this uncertainty, it is possible to identify at least some very general parameters as a starting point for projecting demand for LEP services. For example:

- The Ministry has estimated that, as of May 31, 2003, there were 1,199 sites in British Columbia that were "Active-Under Assessment"[26]. Another 1,673 sites were "Active-Under remediation."[27]

- Ministry information also shows that in 1998-2002 (the post-CSR period for which data is available), the average annual number of contaminated sites remediated was about 175, ranging from a low of 154 (1998) to a high of 183 (2002).[28] These statistics comprise two types of sites: those for which a notice of completion of Independent Remediation was provided but no Certificate of Compliance issued; and, those sites for which a Certificate of Compliance was issued (64-77 Certificates per year, averaging about 70 sites per year)[29]. Additionally, during this time, the Ministry issued 10-20 conditional Certificates of Compliance annually (i.e., an annual average of 15 Conditional Certificates). Taken collectively, these statistics suggest that the historical annual demand for

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[26] This graph is posted on the Ministry Contaminated Sites Information website at http://wlapwww.gov.bc.ca/epd/epdpa/contam_sites/sites_info/may_allsitesbyregion.xls

[27] See:
< http://wlapwww.gov.bc.ca/epd/epdpa/contam_sites/sites_info/may_statusofsite.xls>.

[28] See:
<http://wlapwww.gov.bc.ca/epd/epdpa/contam_sites/sites_info/remediated_annually_2003.xls>

[29] Alan Walker, personal communication with Ministry staff (J. Ward).

reviews respecting Certificates of Compliance and Conditional Certificates of Compliance (whether by the Ministry or by an RPE) approximates 100.

- Indicative of the possible broad scope of contaminated sites in British Columbia is the Auditor-General's confirmation that there are more than 2000 contaminated sites on provincial lands.[30]

These statistics should of course be subjected to considerably more scrutiny before preparation of detailed budgeting and administration. The present data is far from telling and certainly does not provide a basis on which to make an accurate projection of demand for LEP services in the future. This statistical work should take place early in Stage 3. This work should, in part, seek to identify the effects of the Ministry's July 9, 2004 policy (requiring mandatory RPE reviews, as discussed in Part 1.2).

Recognizing existing data limitations, the Subcommittee nonetheless is reasonably confident that the demand for LEP reviews will likely be significantly higher than is now the case for RPEs. In fact, the above-noted estimate of 100 Certificates of Compliance annually may be very conservative for one reason alone: it is not inconceivable that for a given site separate LEP reviews could be used for approvals at various stages prior to the issuance of the Certificate (eg., Approval in principle and contaminated soil relocation agreement). The estimate of 100 may also be conservative because property owners in the past may have been discouraged from applying for a certificate, given the delays involved. (Moreover, it is not inconceivable that property owners who decided against applying for a certificate in the past may in fact apply for a certificate after the start-up of the LEP system to obtain regulatory certainty.)

In turn, the (conservative) estimate of 100 LEP reviews may serve as a basis for illustrating the administrative requirements facing a new Board. For example, in the case of Board performance assessments:

- A 1/10 ratio of performance assessments/reviews, if applied to 100 reviews per year, would result in 10 performance assessments per year. This is significantly higher than the range of 3 to 4 audits completed annually in the RPE system in the period between 2000 (when they were initiated) and 2002. (Part 9.4 above proposes a generally applicable 1/10 ratio.)

- Considerably more performance assessments could result from the contemplated approach (also discussed in Part 9.4 above) requiring the first review, or one of the first three reviews, of every LEP to be subjected to a performance assessment. This further requirement could represent 20-30 performance assessments, although we emphasize that this is merely an illustrative range which requires further attention in Stage 3.

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[30] As outlined in the report, "Managing Contaminated Sites on Provincial Lands," filed in December 2002 by the Office of the Auditor-General, and posted at <http://bcauditor.com/PUBS/2002-03/Report5/audit1.htm>.

These estimates of performance assessments – ranging anywhere from 10 to 30 – are very rough, but nonetheless suggest that the LEP Board will carry out an active performance assessment function and should be addressed as a key budgetary item for a new LEP Board. As discussed in Part 9.4, the Subcommittee proposes that the performance assessment procedure be conducted by two persons, supported by a coordinator.

13.2 Costs of Administering the LEP System

The Subcommittee reviewed information from other jurisdictions to determine categories of costs and rough indications of possible budgetary items. The Subcommittee recommends that Stage 3 work prepare a more detailed draft budget after the necessary statistical analysis of possible demand for review services, but the following is illustrative of the possible magnitude of LEP Board costs:

• Staffing Salaries (Executive Director and Assistant)	$200,000
• Legal	25,000
• Accounting	25,000
• Board and Committee Expenses	30,000
• Contract Assistance (eg. public complaint investigator, research)	70,000
• Office and Overhead	30,000
• Fees for 20 Performance Assessments	200,000[31]
• Performance Assessment Coordination	60,000[32]
• Discipline and Public Complaint Hearing Costs	15,000
	$655,000

The Subcommittee considered the option of housing the administration of the Society within a parent organization. This option has the potential of reducing cost, but might also give the apprehension that the LEP body is linked to, or a branch of, that housing organization. Given these competing benefits, the Subcommittee recommends that Stage 3 consider whether the Society should be administered in association with an existing parent organization.

[31] Fees associated with current amount to approximately $10,000 performance assessment, based on actual costs associated with RPE audit. If a conservative estimate of 20 performance assessments is used, the corresponding fees would be $200,000.00.

[32] Part 9.4 above identified the need for a coordinator. For the purposes of illustration, we assume that the coordinator's fee per performance assessment is $3,000.00. Again, using 20 performance assessments, per year, these costs would be $60,000.00.

13.3 Cost Recovery from LEPs

A reasonable expectation is that LEPs will contribute to the costs of the LEP system in the form of fees. Such cost recovery may be appropriate in the following areas:

- annual membership fees may be used to cover a portion of the Board's administrative costs (eg. in running the disciplinary program);
- examination fees should cover the cost of developing, updating, and administering the Board's licensing exams;
- license application fees should cover the cost of processing each application;
- license renewal fees should cover the cost of processing each license renewal application; and
- continuing education fees should be assessed on a cost recovery basis.

13.4 The Ministry-LEP Cost Sharing

On further statistical analysis of Stage 3, the RSC should be in a position to prepare a more detailed and accurate preliminary budget to serve as the basis for discussions with the Ministry over cost sharing. As a matter of principle, given that LEPs will be carrying out work previously done by civil servants, it is appropriate that the Ministry will make a significant financial contribution to the LEP system in exchange for the offloading of these responsibilities.

As noted above, it is difficult to project with any certainty the revenues and costs of the LEP system. A possible solution to this uncertainty may be found in the approach commonly used in other jurisdictions.[33] Specifically, some jurisdictions in the United States (eg., Massachusetts) forecast revenues for the LEP system, set cost recovery fees at a level that will not serve as a disincentive to LEP participation, and then, recognizing that LEP-derived revenue is insufficient to cover all costs, secure government funding to cover the shortfall. This model warrants further financial analysis in Stage 3.

The financial analysis should compare the United States approach with a blunt 50/50 (or other proportional) allocation of costs between government and LEP-based revenue. A blunt proportional allocation is problematic because of the potential unfairness. If, for example, only 20 LEPs enter the system in the first year, it is neither feasible nor fair to expect these 20 LEPs to shoulder the early potentially high financial costs of the LEP share. To illustrate, if a 50/50 share is used to allocate Ministry and LEP costs, and the

[33] Although the Massachusetts LSP Board is independent of the Department of Environmental Protection, funding for the Board comes from the Commonwealth's Environmental Challenge Fund. The fees that the Board charges to LSPs are also deposited in the same Fund. The Connecticut State Board of Examiners of Environmental Professionals remains within and is supported by the Department of Environmental Protection.

Year One budget is $600,000, the 20 LEPs would be expected to account for 50%, or $300,000. This means that each of these 20 LEPs would be required to cover $15,000. This would almost certainly discourage new entrants into the LEP system (especially those not employed by large companies) during the first few years of the start-up period and may be a fatal obstacle to the development of an LEP system as contemplated by the provincial government.

A blunt 50/50 (or other ratio) approach might be an appropriate way of sharing costs later, once a track record of costs and revenues is established.

To ensure that financial resources are secured in time for the start-up of the LEP system, we recommend that Stage 3, as an immediate priority, conduct a more detailed financial analysis to conclude what a reasonable budget would be, and on that basis conduct the necessary discussions and negotiations with the Ministry to determine an appropriate cost-sharing formula.

Finally, the Subcommittee notes that a successful LEP system depends on adequate funding, both for Stage 3's preparatory work as well as for the critical first few years after start-up.

13.5 Fee Structure for LEP Review Services

The Subcommittee considered whether the LEP Board should provide a fee schedule (with maximum and minimum fees) and other related types of guidance for governing the financial relationship between the LEP and his or her client. One potential advantage of such guidance is that owners would have a reasonable expectation of the costs of retaining a LEP. This advantage, the Subcommittee concluded, does not outweigh the potential difficulty of prescribing reasonable fees, given the vast diversity of sites and their relative complexity. We anticipate that the marketplace may be the more appropriate venue for setting fees. Owners can and should be able to use their own discretion in hiring LEPs. Over time, the marketplace will likely produce a pattern of prices and costs associated with different forms of LEP reviews. At that point, it may be more appropriate to prescribe or suggest LEP fees for any given type of LEP review. The Board should monitor fee issues and consider adopting guidelines, whether mandatory or advisory, as needed. The Board may wish to look to other self-governing professions with long-established fee guidelines, such as architects, for guidance.

13.6 Recommendations for Stage 3

We recommend that Stage 3 includes the following:

- analysis of likely level of demand for LEP service requirements and scope of likely LEP memberships (including consultation with LEPSAG);
- preparation of a preliminary budget of LEP Board (first year and three-year period);
- assessment of whether the LEP Society should be administered in association with a parent organization;
- development of a fee schedule for LEPs, for cost recovery purposes; and
- preparation of Ministry/LEP cost-sharing options (one-year and three-year basis) to be considered by the RSC in pre-April 1, 2006 negotiations over LEP budget financing.

14.0 CONCLUSIONS

14.1 Summary

The salient features of the proposed LEP system are as follows:

- **Society.** The legal foundation would be a "society" under the British Columbia *Society Act*, R.S.B.C. 1996, c. 433. Although it is an imperfect vehicle, the society model does allow for incorporation of fundamental procedures such as establishing a governing Board, setting qualifications for membership, developing a tailored conduct and discipline process and adopting practice guidelines (all key elements of the proposed LEP system).

- **Society Board Membership**. In line with the experience in other jurisdictions, the Subcommittee proposes that industry groups, municipalities and environmental groups in British Columbia may have an interest in participating in the LEP Board. To ensure that these interests are reflected, while at the same time ensuring that the Board size is maintained at a workable level, the Subcommittee proposes the following representation for a 8-seat Board:

    - APEGBC – one member;
    - BCIA – one member;
    - CAB – one member;
    - *one other LEP who is not eligible for membership in any of the three parent organizations;*
    - industry – one member;
    - local governments – one member;
    - environmental group representative – one member; and
    - the Ministry – one member (*ex officio)*.

- **Society Board Functions.** The Board (and its subcommittees) will be primarily concerned with the following functions:

    - upkeep of LEP membership;
    - admissions (including administering examinations and verifying qualifications);
    - discipline of LEPs;
    - conducting performance assessments;

- adopting LEP practice guidelines;
- ongoing education of members;
- development and enforcement of insurance requirements;
- collection of LEP fees;
- liaison with the Ministry on new roles for LEP, and on interpretation, application and revisions to Protocols, guidelines and procedures including:
    - LEP role in entering information on site registry;
    - LEP duties and responsibilities respecting "Summaries of Site Condition";
    - LEP reviews of screening decisions; and
    - flexibility in the regulatory process and the appropriate use of professional judgement;
- administering special qualifications for professionals who are not eligible for qualification in one of the three parent organizations;
- responding to Ministry audits; and
- administration and budgeting.

- **LEP Membership.** The proposed new criteria are:
    - APEGBC, BCIA, or CAB membership;
    - a minimum number of years' experience in contaminated site work (to be determined in Stage 3);
    - passing grade (as established by the Board) on a written examination, likely comprising three separate components: regulatory context; technical application of numeric standards; and technical application of risk assessment;
    - appointment as confirmed by Board (on a review of qualifications and examination); and
    - for other qualified specialists who are not eligible for APEGBC, BCIA, or CAB registration, satisfaction of unique requirements established by the LEP Board.

- **Types of LEP Professionals.** The Subcommittee proposes that the necessary enhanced application of specialized expertise can be achieved with a 'single LEP approach'. The LEP system should recognize that an individual LEP may not have the full 'specialist' background necessary to conduct a comprehensive review of a specific project (as demonstrated by the entry examination), but that he or she may serve as the "lead LEP" who is bound by practice guidelines to turn to LEP and other specialists to cover issues which may arise. This coordination should be the subject of practice guidelines to be prepared in Stage 3 and ultimately adopted by the Board.

- **Forms of LEP Reviews.** LEPs will be allowed, as is now the case for RPEs, to review their own work as well as others' work. However, self-review should be limited to relatively simple matters. A higher degree of independence will be required for reviews that are concerned with complex technical issues. Practice guidelines will specify the conditions under which the two forms of review may apply.

- **Performance Assessments.** A new audit-type function will be called "performance assessments". Performance assessment guidelines (to be developed in Stage 3) should cover the following subjects:

    - appointment of performance assessors;
    - the role of a performance assessment coordinator;
    - triggers for and frequency of performance assessments;
    - conflict of interest respecting LEP/assessor relations;
    - opportunities for exchange of professional views;
    - contents of a performance assessment;
    - time limits;
    - publication of performance assessment;
    - in the event of an unsatisfactory performance assessment, whether notice should be given to the parent organization and whether LEP Board disciplinary proceedings should be engaged;
    - communication of performance assessment to the Ministry and the owner;
    - appeal rights for LEPs; and
    - storage and management of performance assessment documents.

- **Public Complaints.** LEP systems in other jurisdictions typically allow for a public complaint and investigation process for dealing with complaints. This process reflects a policy that an effective public complaints process is necessary for ensuring public confidence in increased LEP reliance. The Subcommittee has concluded that a public complaints process is an essential part of any independent LEP system, especially given the environmental and/or property risk associated with contaminated sites. As in the case of performance assessments, public complaint investigation could reveal serious breaches that warrant further disciplinary consideration. If the apparent breach is significant enough (eg., passes the referral test prescribed in the public complaints procedure), the LEP's conduct could be the subject of both the public complaints process and the disciplinary process.

- **Discipline.** Discipline of LEP members will be a key function of the new LEP Board. Stage 3 will prepare bylaws and related documents respecting the substantive standards to be applied in disciplinary proceedings.

- **Practice Guidelines.** The Framework identifies practice guideline gaps, and how they can be corrected. This analysis proposes, for example, practice guidelines for conducting arm's length and self-assessment reviews, conflict of interest and the role of lead LEPs. The reliance on "practice guidelines" will fill a current gap on how LEPs may conduct their reviews (thus supplementing the existing sources of guidance as to what must be considered).

- **Budgeting and Financial Matters.** Some degree of cost recovery from LEPs and a significant contribution by the Ministry.

As a Framework, this report provides the overall scheme. A substantial amount of work is required before these features can be implemented. Part 14.3 provides a roadmap for conducting this work.

14.2 The Key Differences Compared to the Existing RPE System

This Framework Report recommends numerous changes to the current RPE system. The most notable changes are:

- use of a society as the legal foundation for the new system (as opposed to the current arrangement whereby the RSC is a creation of the Ministry);

- the review system will, as is now the case in the RPE system, allow both self-review and review of others' work, but the new system will rely heavily on practice guidelines to clearly highlight when and how these reviews can be applied (including when self-review can be used);

- although the proposed LEP system will not create separate LEP categories, an important new feature will be considerably more guidance on how the various forms of LEP expertise, if needed at a site, must be coordinated and dealt with expeditiously;

- the LEP Board will have sole responsibility for conducting audit-type "performance assessments" (compared with audits now conducted jointly by Ministry and the RSC);

- an "audit of the audit" function by Ministry, i.e. audits of LEP Board performance assessments; and

- enhanced public complaints and disciplinary processes.

14.3 Implications for Stage 3 Work

Converting the current RPE to the LEP system represents a significant change. The additional challenge is that the system must be have full capacity immediately on start-up (for development purposes, assumed April 1, 2006). That is, the new LEP system must have the capacity to provide the necessary services to persons seeking regulatory approvals respecting non-high risk contaminated sites. These challenges mean that the Stage 3 transition period is crucial. Stage 3 is devoted to development of tools that presumably would be available to an LEP society and its Board upon registration. A very substantial amount of work must be conducted before April 1, 2006 to achieve an orderly transition from the RPE to the LEP system.
The Subcommittee recommends that the six areas of work identified in Part 14.3.1 below should be priorities for Stage 3. Part 14.3.2 identifies work items which appear to be of secondary importance, but which must also be completed prior to start-up.

14.3.1 The Six Priority Areas for Stage 3

If there is one single task requiring attention before April 1, 2006, it is the establishment of the LEP's legal foundation, namely, a society. The essential tasks for preparing a functioning society on start-up include:

- preparation of the requisite *Society Act* application to establish an LEP society (see Part 3.2);

- drafting appropriate constitution and bylaws for the proposed society (see Part 3.2);

- consultation with registrar of societies to confirm whether draft bylaws (particularly those respecting the details of admission, testing and conduct) are appropriate for approval (pursuant to Part 3);

- prepare practical roadmap for installing LEP Board members on the day of establishment (see Part 4.2);
- seek CPPI, UBCM and WCEL cooperation to sit on LEP Board and act as liaison with their respective constituencies (or conversely, develop options in the event that these groups do not wish to perform the function set out in Part 4.3);

- ensure that society bylaws reflect the principles of Part 4.1;

- prepare draft terms of reference for committees of the Board (as described in Part 4.3);

- conducting more detailed review of the availability and extent of coverage of directors' and officers' insurance for the new society, its Boards and volunteers; and

- preparation of professional conduct bylaws (as noted in Part 3.5), including a process to be used by the Board to discipline a member.

A second critical task requiring attention before April 1, 2006 is to ensure that the LEP system has, in fact, an adequate number of LEP members with sufficiently broad expertise that may be required for reviews of a diverse range of sites. Part 6 above proposes pre-April 1, 2006 rollover processes to ensure that the LEP system possesses the necessary capacity on start-up.

A third critical task consists of developing a performance assessment process. As discussed in Part 9, a critical function for the Board – from the day it is established – will consist of conducting performance assessments. Part 9.5 recommends that, given the central importance of performance assessments, the RSC should conduct a trial once the performance assessment process has been finalized (likely late 2005, early 2006).

A fourth priority area pertains to practice guidelines. Of the various tasks, this (together with preparation of society documents) may be the most time-consuming project. These guidelines fall within several categories:

Lead LEPs

- preparation of practice guidelines respecting:

    - when and how a lead LEP should rely on other LEPs for specialized assistances;

    - documentation of such reliance;

- as noted in Part 7.4, review of how three parent organizations provide guidance to their members on the application and coordination of specialized analysis;

Conducting Arm's Length and Self Assessment Reviews

- guidelines on when and how LEP reviewers may give review-type advice to the owner's consultant at an early stage of the work;

- guidelines respecting reviews of work conducted by other members of the LEP's firm;

- conflict of interest guidelines;

Insurance

- preparation of draft insurance disclosure and acknowledgement form (per Part 6.4);

Ethics

- review of whether, given ethics guidelines already present in the parent organizations, there is a need to develop LEP-specific ethics guidelines;

- if no LEP-specific ethics practice guidelines are necessary, consideration of whether 'other' professionals must demonstrate understanding of ethics in parent organizations (both when applying for admission and in response to performance assessments);

General Standard of Care

- review of the existing standard of care applicable to RPEs (Part 12), and whether the broader LEP membership should require a revision;

Relationship with Owner and Successor LEPs

- professional conduct in the event that owner changes LEP (guidance for both the departing and new LEP), including extent of disclosure to new LEP.

The fifth priority is the preparation of a detailed analysis of liability issues. This work should include:

- review of availability of directors and officers liability insurance;

- preparation of insurance availability analysis for Board to consider if it wishes to impose mandatory insurance requirements (to replace the proposed insurance disclosure approach);

- to inform the discussion with the Ministry, the RSC should obtain a detailed legal opinion covering LEP liability issues (including those summarized in Part 11.2); and

- on the basis of its legal opinion, the RSC should approach the Ministry to discuss the implementation of liability protection measures (including consideration of the measures discussed in Part 11.3).

The sixth priority for Stage 3 pertains to financial matters. This financial analysis should include:

- statistical analysis of likely level of LEP service requirements, (i.e., scope of likely LEP membership);

- preparation of likely budget of LEP Board (first year and three-year period);

- fee schedule for LEPs, for cost recovery purposes; and

- preparation of Ministry/LEP cost-sharing options (one-year and three-year basis) to be considered by the RSC in pre-April 1, 2006 negotiations over LEP budget financing.

14.3.2 Other Matters for Stage 3

Although the above-noted priorities should receive immediate attention in Stage 3, other matters should also be addressed before start-up. These other matters fall into these categories:

Public Complaints

- drafting of a plain-language complaint intake, notification and response policy, with consideration given to describing the entire process in the society's draft bylaws;

- drafting of a suitable complaint investigation process with consideration given to describing the process in the draft bylaws;

- drafting guideline document for the society's 'Investigator' regarding assessment of whether a complaint should proceed or be dismissed, including a template for the 'Investigator's Report';

- ensuring that comprehensive ethical and competency standards are articulated in the society's practice standards documentation;

- including an alternative complaint resolution process, such as consent order, mediation or consensual resolution, within the broader conduct framework, with consideration given to including this process in draft bylaws;

- preparation of policy or bylaw regarding reporting from the LEP society to parent organization of conduct matters and referrals to the LEP discipline process;

Relations of LEP Board with Parent Organizations

- preparation of a protocol or memorandum of understanding for the three parent organizations respecting disclosure of disciplinary sanctions imposed by the LEP Board and other matters requiring input from the self-governing professions;

Admissions to LEP Membership

- preparation of draft special admission provisions for the 'other' professionals (as discussed in Part 6.3);

- review whether the current 8/10 year experience rule should be maintained (as discussed in Part 6.2); and

- preparation of drafts of three sets of examinations (regulatory, numeric standards, risk-based standards), including review of sufficiency of existing examinations;